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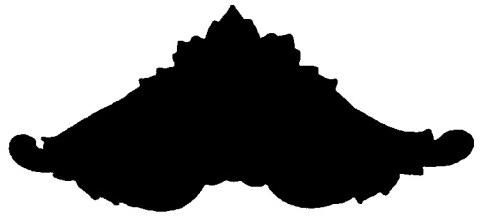
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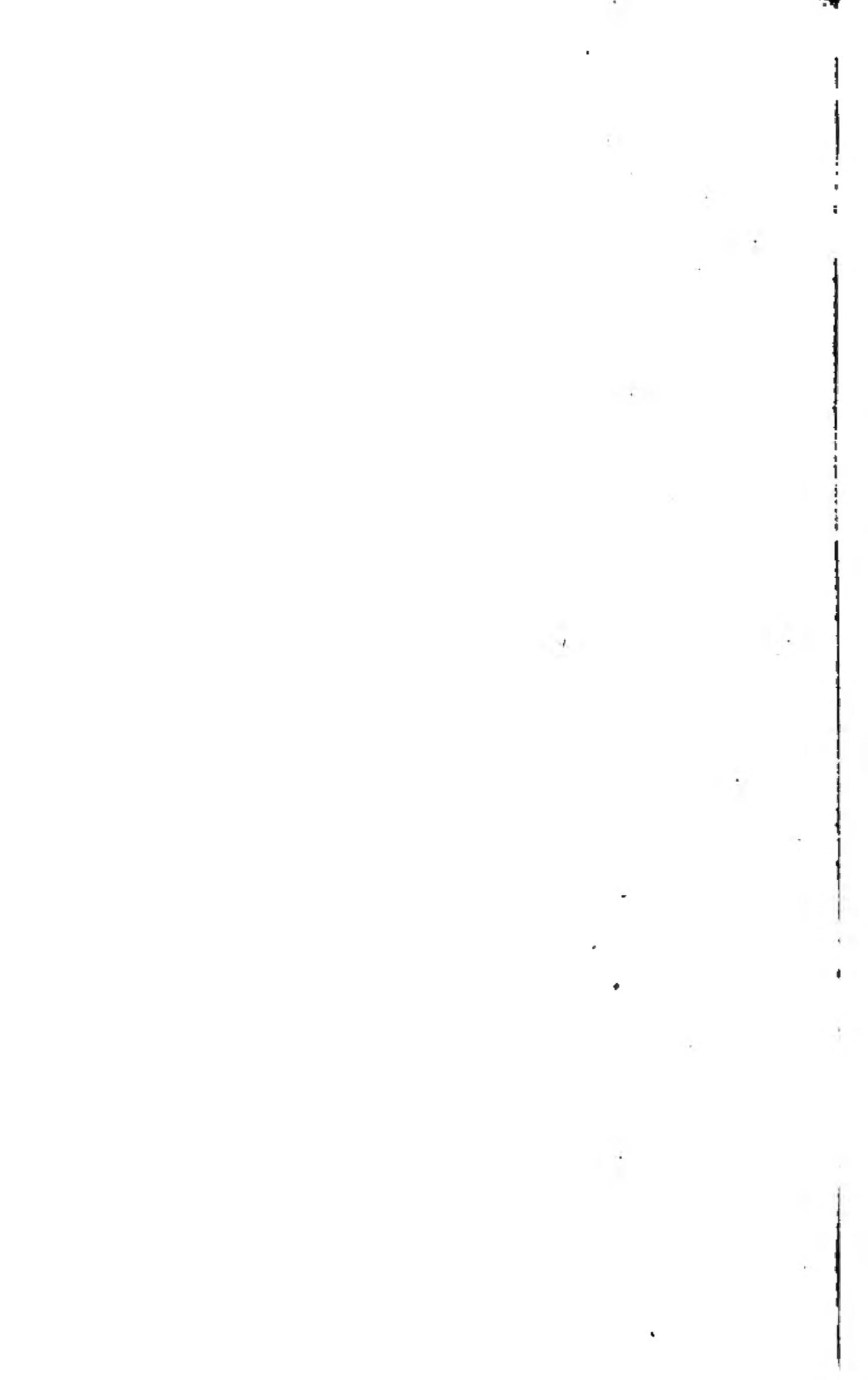
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AN
E S S A Y.
UPON THE LEARNING OF
D E U J S C H E S,
FROM THEIR
INCEPTION BY WRITING,
TO THEIR
CONSUMMATION
BY THE
DEATH OF THE DEVISOR.

By JOHN JOSEPH POWELL, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

*Melius est judicare secundum leges et literas, quam ex propria
scientia et sententia.*

L O N D O N:
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M.DCC.LXXXVIII.

(1788)



TO THE
READER.

THERE is no learning in our law relating to real property more necessary to be known than that which respects the framing of a Devise, and the accidents that belong to it in its ambulatory state before its consummation by the death of the devisor, and yet it has never been collected into any regular chain of connection. With a design therefore to dispose the most material points on this head into a connected view, and to explain the most essential doctrines respecting it, the following Essay was written. How far it has accomplished the purpose, the

Public must judge. Should it meet their approbation, the doctrine of Construction, as applicable to devises after their consummation, is meant to be treated upon at a future period..

N^o 34, Castle-Street, Holborn,
November 1788.

Just published, written by the same AUTHOR,

**An ESSAY on the LEARNING respecting the CREATION
and EXECUTION of POWERS: And also,
Respecting the NATURE and EFFECT of LEASING POWERS:**

A N D,

A TREATISE on the LAW of MORTGAGES.

The Second Edition, revised, corrected, and enlarged.

Printed for P. URIEL, Inner Temple-Lane, and T. WHIELDON,
Fleet-Street.

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E R R A T A.

The Reader's Attention is requested to the following CORRECTIONS.

Page	Line
2	1 for <i>postillam</i> , read <i>post illam</i> .
37	17 — statute, — statutes.
173	21 Side note, for Archer, read Arthur.
179	7 insert side note, <i>Butler v. Baker</i> .
183	23 for statute, read statutes.
208	25 — 1774 — 1744.
234	13 — third and fourth divisions, read fourth division.
245	Side note, for <i>Guthvir</i> , read <i>Gulliver</i> .
283	2 Side note, insert " <i>Hawkins v. Chappel</i> , 1 Atk. 621."
296	19 After " <i>God</i> " put colon, and read " And in the life-time of," &c.
298	8, 9 for " and the other, the wife being living," &c. read " and then the wife sold the lands."
312	25 — devisee, read devisor.
315	2 — persons and not, — persons not.
318	3 — laws, — law.
320	24 after " death," — after her death.
425	14 — turned, — turn.
443	last line, after S. add " and C."
444	8 after daughter, add " and the lands at S. and C."
446	21 — issue, read use.
469	26 — in the land, — in land.
502	12 after " person," — " of the devisee."
638	17 after to, add " it."

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Wellocke v. Hammond, 263, 264.

Westfaling v. Westfaling, 221.

Wibb's case, 418.

Willet v. Sanford, 544.

William v. Edmunds, 27.

Willows v. Lidcot, 234.

Wills v. Palmer, 394.

Winchester's, Marquis of, case,
146.

Winsmore v. Hobert, 235.

Wingfield's case, 607—609. 614.

Winkfield v. Combe, 562.

Wiseman v. Cotton, 5.

v. Baldwin, 261.

Whitchurch v. Whitchurch, 55.

Wood v. Ingersole, 418.

Woodley v. Nightingall, 338.

Worlly v. Johnson, 351.

Wyld's case, 344. 504.

Wyndham v. Chetwynd, 124—
128.

Y.

YELVERTON v. Yelverton,
191.

York v. Stone, 616.

OF THE
L A W
RESPECTING
D E V I S E S, &c.

OF THE
Power of devising Lands at Common Law,
AND
Until the STATUTES of DEVISES, &c.

THE power of devising land existed among the Saxons^a in the fullest extent, as appears by the will of Ethelstan Atheling, son of King Ethelred^b, anno 1015; and that of Bythric^c: and also by the will of Leofwine^d, dated 15th May 998; one testamentary clause of which is, “ Dedi etiam, &c. et meum paternum [quonam] *Leofwari capitale domicilium in Purlea,* “ et quicquid eidem pertinet; et si *Eadwoldæ filius diutius vixerit quam ipsa, ipsi cedat;* si “ illa diutius vixerit, et ita Deus volet, cedat ex-

B

“ inde

^a Bac. on Gov. quart. edit. 109.
Somn. 84, 89.
Spelm. Treat.

Feuds 22.
Wright's Ten. 172.

^b Transcribed in Appendix to Somn. 198, et vid. Saxon Laws et Doomsday Book.

^c Lamb. Peramb. 492, et Textus Roffensis, published by Hearne.

^d Madd Form. Ang. 421.

“ inde ei, qui postillam præstantior sit de nostra
“ cognatione,” &c.

• Glanv. lib. 7.
c. 1. fol. 44.
Plowd. 414 b.
Dyer, 127 b.
Sed. vid. Bac.
on Gov. cap.
62. fol. 126.
but in the
Anglo Saxon
times devisors
sometimes are
found to pray
their lords that
their wills may
stand. Vid.
Madox,
Form. Ang.
Dissert. on
Charters, 2.
note E.

But it appears from Glanville^e, that in his time a man *in extremis* could not by devise give away from his heir even ‘a reasonable part of his land, (which he was allowed to give away by an act taking effect in his life-time); but if he made such a gift *in extremis*, the presumption of law was, that the party was not of sound discretion, and that his act was the consequence of insanity, not of cool deliberation. But a gift made *in ultima voluntate* was good, if assented to and confirmed by the next heir.

But as tenants could not, by the feudal law, alien their tenancies without the licence and consent of their lord, when that system became part of the law of England, this power of disposing by will, (in whatever degree it before existed) as well as every other mode of aliening lands, was altogether incompatible with the existence of that tenure; therefore the power of disposing of real property, as well by will as otherwise, must have generally vanished immediately upon, or soon after, that event.

Some exceptions, indeed; there were to this general restriction on alienation, which were founded

founded either on the local customs of particular places, that were not subjected to military tenure, or on privileges retained by particular parts of the kingdom, with the consent of the first William.

Of the former description were the cities of London, York, and Oxford, and many other cities and boroughs ; by the customs whereof the lands, tenements, or hereditaments, lying or being within the same, might be disposed of by will ; for this was a custom annexed to the land, and not to the person.

Dr. and Stud.
c. 7, 27.
Fitz. Nat. Brev.
459, 463.
Bro. tit. Dev.
43, 51.
Ibid. tit. Cus-
toms, 41.

And, therefore, if land in London came into the hands of the crown by escheat or otherwise, and the crown granted it over to hold by knight's service, yet the whole land was devisable in like manner as it was at common law.

But a distinction was made between citizens and freemen of London resident, and those who were not of that description, but were seised of lands there ; namely, that the former were privileged to devise in mortmain, which the latter could not do. But it was necessary that such devises in mortmain should be enrolled, which devises to laymen need not to have been.

Bro. tit. Dev.
22.
tit. Cust. 36, 41.
tit. Dev. 7, 28.

Fitz. Nat.
Brev. 459.

And the method by which the devisee got possession of lands devised, when the heir of the devisor entered and detained them from him, was, by the writ of *ex gravi querela*, which lay when a man seised of lands or tenements in any city, town, or borough, where lands were by custom devisable, or of gavelkind lands, devised those lands or tenements.

Bro. tit. Dev. 43.
Bro. tit. Cust.
38.
Litt. tit. Burg.

But it seems questionable, whether that writ was incident to all lands that were devisable; the better opinion seeming to be, that it only extended to those lands where the custom was that a writ of *ex gravi querela* lay; for in this respect the customs seem to have differed. In some places seisin of the devised lands were given by the bailiff; in others the devisee might enter; in others a suit was instituted on an *ex gravi querela*.

Bro. tit. Cust.
38.
Old Tenure,
verb. Burgage.

So it appears that, in boroughs, those who held in burgage tenure might set up such a custom; and the writ stated, that the devisor held his lands as he did his chattels; nor was residence necessary.

Of the latter description before alluded to, were lands, tenements, or hereditaments, holden in gavelkind.

But

But some doubts have been entertained whether this custom of devising was incident to that species of tenure, or whether it was a local custom of Kent, independent of and collateral thereto. This point was much litigated in the case of *Lauder* and *Brooks*, and it was at length agreed (after several trials and verdicts, six of which were in favour of the custom, and one only against it, and that one with the disapprobation of the court, who carried their dislike of it so far as to stay the entering the judgment in that action until a new ejectment was brought and tried) that this was a part of the custom of Kent,

Lauder vers.
Brooks, Cro.
Car. 561. S. C.
2 Sid. 154.

This point was again tried, at the King's Bench bar, by a jury of Kent, in the 14 Car. II. in the case of *Wiseman* and *Cotton*; and it was found, that gavelkind lands were devisable by the custom of Kent. And like verdicts and resolutions were given in Queen Anne's reign, in the cases of *Arthur* and *Bokenham*, in the Queen's Bench, and *Bunker* and *Cock* in the Common Pleas; both of which causes arose on the will of *William Bokenham*: but several instances are given in Mr. Robinson's treatise on that tenure, that the same custom prevails in gavelkind lands in North Wales.

Wiseman
v. *Cotton*,
1 Sid. 77, 135.
Hard. 325.
Raym. 59, 76.
1 Lev. 79.

Fitzgib. 225,
233.
Salk. 239.

Rob. Gavelk.
242.

Terms for years, and all chattel interests, also were not affected by this consequence of the introduction of feuds; they being, on account of their original insignificance, deemed personalty, and, as such, capable of disposition by will.

Although the feudal restraint on alienation could not but yield to the importunities of a people, who were constantly seizing upon every conjuncture that opened the least prospect of obtaining from the crown the re-establishment of their ancient and venerable laws, (the suspension of which, as to alienation, seems to have been of all other the most obnoxious intrusion) and the statute of *quia emptores terrarum*, by which the restraint on alienation was in a great degree removed, was procured; yet the restraint on devising continued for several centuries. The cause of which has been imputed, partly to an apprehension, that the infirmity and consequent imposition to which a testator was exposed, rendered such devise suspicious; and partly to this species of conveyance not being attended with that general notoriety and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer.

¹ Rolle, Abr. 608.

¹ Blackst. Comm. 374, 375.

Wright's Ten. 173.

fer and new acquisition of property, but which did not exist in the case of a devise. But whatever inconveniences might be incident to this mode of alienation, to take effect after the death of the owner, it was soon found that there was no other way of rendering real property subservient to the casualties that arise in family affairs; for in direct successions *ab intestato* of real estates, the succession was governed by the political consequences of a positive system, which constituted the eldest son only heir. And among collaterals, not all the next of kin, but one was heir, to the exclusion of many in the same and many in a nearer degree. Simple contract creditors were not entitled to be paid their debts, and other hardships arose: but the devising power removed all these difficulties, by enabling a man to do justice to his family and creditors.

Per Lord Mansfield.
1 Burr. 420.

During the suspension of this power, therefore, which continued from the reign of Henry II. to the latter end of that of Henry VIII. the necessity of family arrangement made the people ready to receive with avidity any contrivance to reinstate them in the possession of the valuable privilege of devising: and the ingenuity of ecclesiastics soon furnished them with a means by which they might substantially,

Gilb. Dev. 9.
Hale's Hist.
Com. Law,
222. sed vid.
Glanv. Lib. 7,
c. 1. 45.

though not directly, enjoy this privilege, under colour of a declaration of uses ; an invention adopted by them from the civil law, to evade the statutes of mortmain ; and which the clergy, who found men were most liberal to the church when they could enjoy their worldly possessions no longer, enforced as binding upon the conscience, and therefore solely cognizable in the court of Chancery, where they generally sat.

Vid. Harg.
Notes Co. Litt.
111.

But at length this practice was checked, not accidentally, but designedly, by the statute of the 27th of Henry VIII, which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them, and so had the effect of wholly destroying all distinction between them, till the means to evade this statute, and, by a very strained construction, to make its operation dependant on the intention of parties, was invented. The consequence was, that lands generally once more became inalienable, unless by conveyance, to take effect in the life-time of the proprietor.

However, the bent of the times *inclined* so strongly in favour of alienation, and the necessity of there being some mode by which men might render their property subservient to family purposes was so obvious, that the legislature found

found it necessary, within a very few years, in the 31st of Henry VIII. to interpose in the regulation of this species of conveyance; and the crown was easily prevailed on to give its assent, by a statute made for that purpose, to the establishment of devises; especially as it was done in a manner that could be but of small detriment to the military tenures, which were then upon their decline in this country.

The statute of the 31st of Henry VIII. was afterwards explained by another statute, made in the 34th year of the same prince's reign.

Afterwards it was found necessary, for reasons which will be stated in a future part of this Essay, to add further regulations to this mode of conveyance, which were effected by the statute of frauds and perjuries, passed in the 29th year of the reign of Charles II,

It will not be necessary, at this period of time, to enter into the consideration of the nice and curious questions which arose on that branch of these statutes which relates to the proportions of lands devisable by those who held by knight's service, as such enquiry would now be considered rather as matter of speculation and curiosity than of real use; since, by the alteration

tion of tenures in consequence of the statute of Charles II. all the land in the kingdom, except copyhold (the law respecting which will make no part of this work) is become socage; and consequently universally devisable either by custom or statute.

A devise then, thus considered, is an instrument consisting of two parts; namely, the external or material part, and the internal or operative part. The former relates to the frame of the instrument, and includes the consideration of what solemnities were necessary thereto by the customs of devising, and such as are added by the statutes of wills, and of frauds and perjuries. The latter may be again divided into two parts; namely, first, the formal or orderly part; secondly, the internal or intellectual part.

The formal or orderly part comprises the parties to the instrument, and the subject matter on which it is to operate.

The internal or intellectual part includes the law of devises, as it applies to the construction thereof, with respect to the several estates or interests created thereby in the subject matter devised.

The present treatise will be confined to two parts only of the instrument; namely, the external or material part, and the internal or operative part, so far as it includes the formal or orderly part of the instrument. And in treating upon the subject in this view of it, the situation of a devise will be considered at three periods of time: first, at its commencement by writing, publication, &c. secondly, in its progression, which will involve in it the consideration of all incidents to which it is liable whilst *in fieri*; and, thirdly, at its consummation by death of the devisor, which will lead to observations upon the jurisdiction to which the consideration of it belongs, the manner of proving it, &c.

O F A
D E U J S E
 UNDER THE
S T A T U T E S of the 32d and 34th
 Henry VIII.

32 Hen. VIII.
 c. 1.
 34, 35 Hen.
 VIII. c. 5.
 12 Car. 2, 24.

A Devise or will, made pursuant to the statutes of the 32d and 34th of Henry VIII. is an irregular instrument in writing, in law distinguishable from a deed, by which all persons not disqualified, " having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common of any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or any of them; or any rent, common, or other profits, or commodities out of, or to be perceived of the same, or out of any parcel thereof," may dispose of them at his free will and pleasure, but not to take place until after his death, to any other person*, but not to bodies corporate, for such estate or interest therein as he pleases.

* Vide infra, as to alien.

I describe a devise made pursuant to the statutes of Henry VIII. to be an irregular instrument, because those statutes have not prescribed in

in what form of words the instrument itself, purporting a devise, shall be made; therefore any writing, by which the intention of the party to give or dispose of lands or hereditaments appears, provided such intention is not contrary to the established rules of law, having the formalities required by law, under these statutes, will amount to a devise. A deed, if made with a view to the disposition of a man's estates after his death, will enure in law as a devise or will.

Thus, where W. seised in fee, made a writing in this form: " This indenture, made the
 " day of between C. W. of, &c.
 " of the one part, and J. O. of, &c. and W. S.
 " of, &c. of the other part: whereas there are
 " divers debts owing to C. W. and having an
 " intention not only to raise portions for his
 " younger children, but also to raise money for
 " the payment of his debts, although his personal
 " estate come not in; now the said C. W. in
 " consideration of 5l. doth grant, bargain, and
 " sell to the said J. O. and W. S. all those lands,
 " &c." (mentioning the lands, but not the estate).
 " on trust to sell the same after his decease; the
 " money raised by sale to be employed as fol-
 " lows"—and then named several persons to re-
 " ceive several sums—" and the rest of my money
 " and plate, and other my personal estate of me
 " the said W." (the testator in this part chang-
 ing

Hixon, v. Wy-
 tham, 1 Ch.
 Ca. 248.
 S. C. Finch,
 195.

ing the person, and speaking in the first and not in the third person) "I give and bequeath in manner following," and then he appointed to several persons several sums, afterwards adding, "I hereby name the said O. and S. my executors to the uses aforesaid." *And the said writing was signed, sealed, published, and declared to be his last will, in the presence of several witnesses.* C. W. soon afterwards died; and one question was, Whether this instrument in writing was a will, it being made in the form of an indenture? and it was decreed by the Lord Keeper, that it was a good will.

And if the intent of the donor be to make a will, the instrument will operate as such, although an actual delivery be made of it as a deed.

*Green v.
Proude,
3 Keb. 310.
S.C. 1 Mod.
117.*

Thus, where the plaintiff's title was by the will of F. which was intitled "Articles of Agreement," and began thus, "It is agreed between the said Nicholas and Walter, that Nicholas, being sick in body, gives, &c. in consideration whereof, the said Walter promised to pay several legacies;" and the conclusion was, "In witness whereof the parties have hereunto interchangeably set their hands and seals." And this was delivered as an act and deed. The question was, Whether this instrument was revocable? which depended on its being considered in law as a will or as a deed;

deed; and it was contended that it was of the latter species of conveyance, being delivered as such; but it was held *per curiam*, that, there being directions given to make a will, and a person sent for to that end and purpose, this was a good will.

A will may be made on several sheets of paper, and the law does not require that they should be affixed together.

*i Show. 69.
Comb. 174.*

And where one sheet of a will was found in Essex, and another in Staffordshire, it was agreed, before the statute of frauds, that both sheets made but one will.

*Earl of Essex's
case, cited &
Show. 69.
Comb. 174.*

It is not necessary that the whole will should be made at the same time; nor is it material at what distance of time from the writing the one part, the devisor resumes the subject and completes the will; whether the period be two days or two years, the effect will be the same.

*Carlton, ex.
Dem. Griffin v.
Griffio, infra.*

And a will may be made by several distinct memorandums; each of which may be signed by the testator.

Thus, where A. B. the devisor, wrote upon a sheet of paper with his own hand as follows:

I

" Know

*Carlton, ex.
Dem. Griffin
v. Griffin.
i Burr. 548.*

" Know all men by these presents; that I A. B.
 " &c. make the afermentioned my last will and
 " testament, &c." and, after devising lands and
 chattels, concluded thus; " I pray God to bless
 " and direct my wife, daughter, and son; and I
 " die in peace with all mankind, and I hope the
 " Lord Jesus will receive my soul. And this is
 " my last will, *and not any other.* 2d' day of
 " May 1752;" and the devisor subscribed it at
 the same time when he wrote it. But this part
 was neither sealed nor attested. A. B. after-
 wards wrote on the same sheet of paper the
 following words, viz. " Memorandum. Black-
 " man Street, 5th Jan. 1754.. Whereas I have
 " laid out, &c. on a lighter, &c. and the barge
 " called the Lemon, &c. all these, and also all,
 " &c. at my death; all shall be at my present
 " wife *Mary's* disposal; and this is not to disan-
 " nul any of the former part made by me, the
 " 2d: of May 1752, except that my wife shall
 " not be liable to pay to my son John, &c. Wit-
 " ness my hand, J. Griffin, senior." The first
 part was written on the first and second sides of
 a sheet of paper, and the memorandum was be-
 gun either upon the end of the second or the
 beginning of the third, and written upon the
 third side: this was subscribed, and the whole
 delivered in the presence of three witnesses. It
 became material (with a view to another que-
 tion

tion which will be spoken of hereafter) to decide, whether this was to be considered as one entire instrument, or as two distinct instruments, viz. a will, and a codicil.

And the court were of opinion, that this was one entire instrument, and the latter memorandum a continuation of the former act; for the testator himself called it a memorandum, and declared, "that he did not mean thereby to disannul any part of his former devise or dispositions;" after he had written the former part, he took up the consideration of something further that had occurred to him, and it was not material whether he did that at two days or two years distance from writing the former part. A man was not obliged to make his whole will all at the same time: and the testator having originally signed the former part, did no harm; it made it more solemn, but did not hurt it.

Ibid.

A man may make several partial and particular dispositions relating to several parts of his estate, by distinct instruments; and, though written on several papers, they will all stand together, for whatever number of instruments in nature of wills a man makes, yet if they be not contradictory, they are considered, in law, as making together but one devise; and, taken

C

together,

together, contain the devisor's whole will as to his whole property.

¹ Show. 545.
bid. 553.

Thus, in a case cited by Serjeant Maynard in the case of *Hitchins and Basset*, and agreed to by the council on the other side, it appeared, that where A. seised of lands in Blackfriars, and also of other lands, made a will, and thereby devised the former lands to the hospital of B. in Smithfield, and afterwards made another will, and devised lands he had elsewhere to C. it was held by all the judges that *both wills*, being of divers things, might stand together.

¹ Show. 549.

But it seems that, in such case, the wills must not be declared upon generally, "as that the devisor made his *last will*," but particularly that he made his *last will of such a manor, &c.*

And as a man that hath several real estates may devise them by several and distinct wills, so likewise he may make several devises of different interests in one and the same estate.

Coward v. Mar-
shal, Cr. Eliz.
721. et vid. I
Vez. 187.

Thus, where A. by one will, devised his lands to I. his youngest son and his heirs, and afterwards married again, and then by another will devised the land to his wife for life, paying annually to I. his youngest son and his heirs

*

heirs such a rent; the question was, Whether this second will was a revocation of the former? And *Anderson* and *Glanville* held it to be no revocation, but that both might stand, although they were by several writings, unless the last were manifestly contrary to the first will, or that there were an express revocation therein; for they ought to stand together, if they might, in like manner as if made by and in one and the same writing: and here the testator's intention appeared, that he had not any purpose to alter the will as to his son, but only to provide for his wife, whom he had married after the first will was made; and by the appointing of the rent to his son, it appeared his intent was, that the reversion should be to his son.

So likewise a latter devise may modify and qualify what is given by a former, and a legacy may take effect out of both.

Thus, where A. the brother of the defendant, made a will, dated October 12, 1738, and thereby, among other things, gave to his sister E. B. the sum of £. 800, and also to his sister C. the sum of £. 400, and after giving other pecuniary legacies, bequeathed the remainder of his estate, and all his *freehold* and personal estate whatsoever, not therein otherwise disposed of, after

*Brudenell v.
Boughton,
2 Atk. 262.*

payment made of his just debts and legacies, to his brother S. B. whom he also appointed his executor: afterwards A. by a subsequent will, dated the 22d May 1741, revoking all former wills, gave to his sister C. the sum of £. 100, and to his sister E. B. the sum of £. 400, and, lastly, gave and bequeathed to his brother S. B. all the rest of his estate, real and personal, and appointed him his executor. There was also a memorandum directed to S. B. in the following words, viz. “ I beg to recommend my sister, “ E. B. to your kindness; and, besides the legacy left her, I beg you would give to my godchild £. 200; and in case that child should be dead, I desire you may give that sum to her eldest son. I desire this only in case you make use of the last will.” This was signed R. B. and dated June 9, 1741.

Ibid.

A bill was brought by E. B. and her husband, to have the legacies left to her raised and paid by the defendant, out of the testator’s real estate. And one question was, Whether the lesser legacies under the second will, were a charge upon the testator’s real estate? And Lord Hardwicke said, this was a question of some difficulty; but he was of opinion that they were. He considered the question in two lights: First, as if new legacies had been given originally and *de novo*: Secondly,

Secondly, Whether these were not part of the same legacies deduced and newly modified? By the words of the second will, "he gave the *rest*: " of his estate, real and personal, to his dear brother S. B. and appointed him his executor." So that the land, as well as the personal estate, was given to the same person that he made executor: all the legacies therefore, if considered as *de novo*, would be charged upon the land.

But, in the present case, the legacies given by the second will might be considered as part of the money given by the first, only new modelled or qualified. These were lesser sums; £. 100 instead of £. 400, and £. 400 instead of £. 800. If they had been given exactly in the same manner, and to the same persons, there could have been no doubt but that the latter bequest being of lesser sums, it would have operated as a revocation *pro tanto*, and the latter bequest would undoubtedly have remained a charge upon the land; but the devisors having given them differently, and to different persons, made the nicety. However, he was of opinion, this was no more than a lessening of the quantum of the money given by the former will, only differently modified. By the testator's doubt, indeed, viz. "I desire this only in case you should

Ibid.

"make use of the last will," it looked as if he had an intention to leave it in the discretion of the brother, whether he would make use of the last will or not; though it was a little odd this should be his intention, because the one was for, and the other against, the interest of his brother: therefore, upon the whole, his lordship decreed the raising the lesser sums out of the real estate of the testator,

And a will may be made to take effect, with reference to another instrument.

Molineux v.
Molineux,
Cro. L. 144.
Noy. Rep. 117.
et vid. 2 Atk.
273. et infra.

Thus, where J. M. made his will in these words: "Concerning the disposition and order of certain annuities or rents, to be issuing out of certain lands and tenements as followeth; Whereas I have lands in Thorp, &c. in the county of Nottingham, I will that my younger children, not married, viz. Edward, Thomas, and Christopher, &c, shall have such several annuities or annual rents, as be expressed in several writings signed with my hand, and sealed with my seal, according to the true meaning of my said writings." One question was, If this was a good devise of the said annuities within the statutes of Henry VIII? and the court held upon this point, that this will, devising such rents which were mentioned in such writings

writings under the devisor's hand and seal, was a good devise, in writing, of the rents themselves: for it referred to the writing, whatsoever it was, *as if it had been specially limited in that will.*

So where the directions of a will were for the executors to pay £. 3000, as the testator should by *deed* appoint, and the testator afterwards by deed appointed, so that the bequest depended upon the *deed*, per curiam, the deed referring to the will is, as to this purpose, to be taken as part thereof, in the nature of a codicil thereunto explanatory of the will.

Metham vers.
Duke of Devon.
1 P. Will. 530.
vid. infra.

And as a man may make several wills of distinct parts of his land, or distinct interests therein, so, likewise, may he make one or more codicils, altering, explaining, adding, or subtracting from what has been before devised, or devising parts of his land not given by his will; and the law will annex such codicil, or codicils, to his will, and consider the whole as one instrument.

Fuller v. Hooper
2 Vez. 242. et
vid. 1 Vez. 187.

It is here observable, that the term Codicil appears to have come to us from the civil law, and means an appendage to a will: the word, it is apprehended, is a derivative from Codex, and seems more properly to belong to testaments, which

1 Vez. 187.

operate upon personal property, than to devises, which are to affect real property; for a codicil, strictly speaking, is an unsolemn will, and was formerly distinguished from a testament in this circumstance; namely, that the former did not admit the constitution of an executor, but the latter could not be made without it. The business of a codicil, by intendment of law, was to alter, explain, add, or subtract something from the will; and it should seem that, by analogy to this use of the codicil in testaments, memorandums, or instruments, respecting lands, which had for their object the altering, explaining, adding to, or subtracting from a devise of land, were likewise introduced under the same form, and, when so shaped, acquired the same appellation; for the appointment of an executor not being necessary to a devise, and any instrument altering, explaining, adding to, or subtracting from a devise, requiring all the legal formalities of a devise itself; a codicil, in that sense in which it is used in the civil law, namely, as an unsolemn devise, cannot exist.

As to other distinctions between codicils and wills, vide infra.

Devises and codicils respecting lands, as well as testaments and codicils respecting chattels, agree in the efficient cause; for every person who may devise, may also make a codicil; and

and whosoever cannot devise, cannot make a codicil,

In the construction of the statutes of Henry VIII, it has been held, that every devise or bequest of lands or hereditaments made pursuant thereto, must be *entirely* in writing; that being a circumstance without which lands, tenements, or hereditaments, cannot be effectually given by virtue of the power of devising allowed by those statutes,

Vid. Bland v.
Middleton,
2 Ch. Cas. L.
Plowd 346.

But the judges, whose business it was to compound the statutes of Henry VIII, yielding to the bent of the times, and with a view to extend the privilege of devising as much as possible, in the construction they gave to the word "writing," took it in its most extensive and vague sense,

Thus, it is stated in Moore, to have been said by Popham, C. J. of England, in his reading; that if a man expressed by a letter, what was his will respecting the disposition of his land, that was sufficient; and he stated, in support of this position, the case of one *West*, who went to sea, and wrote a letter in which he mentioned that his lands should go as he therein directed; which was held to be a good will,

Moore 177, PL
314. West's
case.

Brown, v.
Sackville,
Dyer, 72. 2.
S. C. Ander-
son, 34. Pl. 85.
S. C. by name
of Brown v.
Atkins, Kelw.
289 a.

Nor was it deemed necessary that the writing should be by the devisor himself; for where a man, seised in fee-simple in socage lands, being sick in bed, sent for a lawyer and requested his advice in making his will, and the lawyer took notes thereof and went away, and at about eight in the morning wrote the will according to legal form in pursuance of the notes and agreeable to the will of the devisor declared to him; the will was finished before eleven o'clock on the same day, and the devisor died at twelve; so that he did not hear the will read. The opinion of the court was, that this was a good will in writing; and several cases were there put, and determined upon the same point.

1 Leon. 79.
Pl. 120.
Easter, 24 Eliz.
3 Leon. 113.
Pl. 155.
Easter, 29 Eliz.

And it is said, in two anonymous cases, that, if one lying *in extremis*, having *an intent to devise his lands* by word, had made such devise, *but had not commanded the same to be put in writing*, and another, without the knowledge or command of the devisor, had put it into writing in the life-time of the devisor, this had been a good will; for it was sufficient if the devise were reduced into writing in the life-time of the devisor. The same rule was laid down, as to a devise of lands officially put in writing by any

any of the standers by, in the case of *Ludwell* and *Symson.*

*Ludwell v.
Symson.
1 Keb. 88o.
East, 17 Car,*

But the law, as stated in these cases, was denied in the case of *Nash* and *Edwards*, which was decided in Michaelmas term, in the 30th year of Elizabeth. In that case, D. seised in fee of land held in soccage, declared to N. and others, that his will was, that C. should have his land; and N. recited the words to him, and asked him if this was and should be his will, and he was answered, that it was. N. in the life-time of D. as for his own remembrance and without the direction of D. wrote the said will, 'but did not read it to the devisor. Afterwards D. died. The question was, if this were a good will, being spoken in such direct words, and being written in the life of the devisor by the witness for his own remembrance, and without the appointment of D.? And all the Justices delivered their opinions *seriatim*, that it was a void devise; because the will was not written by the command of the devisor, or by his consent, but by the person present, of his own head.

*Nash v. Ed-
wards.
Cro. Eliz. 109.
Sc. 1 Leon.
113.
William v.
Edmunds,
Dyer, 72, 2
note. 2 same
law.*

*Newdicate's
case, Dyer 72.
note 2.*

But it was said, in the last case, that if the witness had written it without the devisor's consent, and afterwards had read it to him, this had been as good as if written by his appointment.

*Sed quare et
vid. Dyer 72.
note 2.
Williams, v.
Edmund's
cont.*

The

Dime v.

Munday,
Bates's case,
Sd. 362, Pt. 7.
S.C. 2 Keb. 345.

The latter opinion seems to have been adopted in a subsequent case, the facts of which were as follows: A memorandum, that B. did declare and express, that his brother J. B. and his heirs should be heir to his land, was written by a physician, and the testator, being sick in bed, was asked if he approved it, which he did, and sealed it, but did not sign it; and this was, on debate in court, allowed to be a good will in writing to convey lands. But it appears, from the report of this case in Keble, that this question arose on a trial at bar, and that the judges would have had it found specially; but the counsel objected, in consequence of which a general verdict was given,

Cited in Nash
v. Edwards,
1 Leon, 113.
But a will
must not be
made by ques-
tions; vid.
C. & J. 497.

But the writing must have been by the person directed to make the notes or will by the testator; for, per Wray, if he appointed A. to write his will, and it was written by B. it was void, unless it were afterwards read to the testator, and he approved it.

Cesfar and
Lake's case,
Dyer 72, note 2,
3 Rep. 31 b.

In the exposition of these statutes it was also held, that the devise must be completely put in writing during the life of the devisor. Therefore, if a man had commanded another to make his will, and to devise W. Acre to J. S. and his heirs upon condition, and he had written the devise

to

to J. S. and his heirs, and before he had written the condition the devisor had died, this devise would have been void ; and the reason was, that the devise was not full, but maimed and imperfect ; because the whole devise to J. S. was not put in writing.

So where a man intended his lands for J. S. with remainder to J. D. and the devisor died before the remainder was put into writing ; this was held not to be a devise within the statutes of Henry VIII. because the one devise depended on the other.

Cæsar and
Lake's case,
cited Dyer 72,
note 2, 1 Skinner 72.

But where the devisor directed several distinct devises, and he happened to die after the completion of one, and before the other was put into writing, the former was held good ; and therefore, if one had commanded another to make his will, and thereby to devise W. Acre to J. S. and his heirs, and B. Acre to J. N. and his heirs, and he had written the devise to J. S. and his heirs in the life of the devisor, and before the devise to J. N. and his heirs had been written, the devisor had died, yet the devise to J. S. had been good.

Ibid. et 3 Rep.
31.

And it was held, that a devise, under these statutes, if in writing, might be good in part, and void as to the rest.

Thus,

Sir Richard
Pexhall's case,
Dyer 72, note
8.

Thus, where P. devised certain lands to his wife for her jointure, and the scrivener inserted a condition, and the devisor hearing it read, said this was not his intention; the devise was held good, and the condition void, for, that he countermanded it by parol.

Ludwell v.
Sympson,
1 Keb. 880.

But where the directions were to devise on condition, and the devise was without condition, it was held, *per curiam*, to be void.

Downhall v.
Catesby,
Moor 356,
S.C. Co. Ent.
252, cont.

So where the devisor gave his instructions to make his will in writing, and directed his land to be given to one of his sons for life; and the clerk, mistaking, wrote an estate in fee, three judges against one held, that the will was utterly void, because it was not the will of the testator. The reason of which latter determinations seems to have been, that the devise was not written in the life of the testator; whereas, in the former case, the devise was written, and more.

Bigne v.
Munday,
Bate's case,
Sid. 361.

Signing by the devisor was not held to be necessary under these statutes.

Anon, 2 Leon.
35, S.C.
3 Leon. 79.

Nor was it necessary even that the testator's name should appear on the face of the instrument; for where a man made his will in this manner, "I will and bequeath my land to A." and

and the name of the devisor was not in the will; yet it was held that the devise was good by averment of the name of the devisor.

The disposition of the courts to support this species of alienation carried them so far, that any scrap of writing, though it was neither signed, sealed, or written by the testator, might have been established by the evidence of one witness as a will of land, even though that person were a legatee, if he released.

This did, in fact, happen in a very remarkable case; that of Sir *Edward Worsley's* will.

In that case, some loose sheets of paper were produced as the will of Sir *Edward*, and a title set up under them in favour of his natural daughter. They were written by one *Baynbam*, an attorney, of Gray's Inn. Sir *Edward* had not signed them, and there was no evidence offered to prove them published, but that of *Baynbam*. His evidence was objected to; for, that he was a legatee of a sum of money, and also had an annuity for life bequeathed to him. But a release of the annuity and acquittance of the legacy was produced; upon which circumstance the court admitted his evidence, and a verdict was thereupon given in favour of the will.

*Stephens v.
Gerrard,
2 Keb. 128, PL
82. S. C. Sid.
315. Pl. 33.*

The

The amount of *Baynbam's* evidence, as stated by *Siderfin*, was, that Sir *Edward* dictated a writing made by him, and caused it to be interlined, and said, that he intended to write it over again himself, but in the mean time, that this should be his will; but he refused then to sign or publish it as such; and the conclusion was, "In witness whereof, I have put my hand and seal to every sheet," and he had not done it to any one sheet; yet the court held this a sufficient will, and so it was found by the jury.

Lord Camd.
arg. in Doe v.
Kersey.

This decision, disinheriting an heir at law by a will so made and so attested, the same person being drawer, legatee, and witness, though consonant to law at that time, was considered as a very great hardship; and the dangerous consequence of deviating so far from the safe and sound rules of the common law, in the alienation of property, became obvious to every one that reflected upon the consequences that must follow such a decision. Two great and alarming considerations arose out of this case; namely, that such an unfinished paper should be deemed a will; and that one person, *so interested*, should be the only witness.

Ibid.

It was obvious to every one, as soon as this case was determined, that testators would be delivered

livered up to the practices of crafty and designing men, if such wills and such witnesses were any longer suffered to prevail; and it has been thought, that this case gave rise to the clause respecting wills in the statute of frauds. Indeed, when it is considered, that this case happened in the 18th of Car. II. and that the law was made but eleven years after; when it is found by the provisions of the law that, for the future, the will is to be a perfect instrument signed by the testator; and that three credible witnesses at least are introduced to be present at the transaction, pointing directly at the two grievances in Sir *Francis Worsley's* case, and going no further; the provisions are so remarkably adapted to meet that case, that little doubt can be entertained but that the framers of the clause had it in view.

OR
 INTERESTS AND ESTATES
 OUT OF THE PURVIEW
 OF THE
 STATUTES OF WILLS.

Bishop verf.
 Fountaine,
 3 Lev. 427.
 Fearn's Con-
 tingent Rem.
 291.

IT was formerly held that contingent interests in lands, resting merely in possibility, were incapable of being passed by a will made previous to their vesting.

Selwyn v. Sel-
 wyn, 1 Blackst.
 222. infra 600.

Moor v. Haw-
 kins, cited
 Blackst. Term
 Rep. Trin.
 1788. fol. 33,
 34

But the law is clearly now held to be otherwise, the old authorities having been over-ruled impliedly in the case of *Selwin* and *Selwin*, and positively in the case of *Moor* and his wife against *Hawkins*. In the latter case G. devised all his real estates, in trust for his son I. and if he should die without issue under age, then that all his estates should go to C. his heirs and assigns. C. devised all the estates whereof he was seised in possession, remainder or reversion to M. and died in the life-time of I. who afterwards died under twenty-one, and without issue. And the question was, Whether the possibility given to C. was devisable? *Et per Lord Northington*—I had never any doubt but that these contingent interests were devisable notwithstanding some old authorities to

to the contrary. I sent the question into the King's Bench, in the case of *Selwin* and *Selwin*, and the certificate of the Judges implied, I think, that they agreed with me in opinion. The point is settled and ought not to be shaken. It is a liberal and right determination.

And in the case of *Roe* on the demise of *Perry* against *Jones*, the Court of Common Pleas, taking the interest there in question on a devise to be a springing, contingent, executory use, were unanimously of opinion, upon the foundation of the above cases, that it was devisable and passed by the will.

Roe on Dem.
Perry v. Jones,
ibid 30—34.

But an estate that is turned to a right, as a reversion *discontinued*, is not within the purview of these statutes.

Thus where C. was tenant in tail, the reversion to R. and they joined in a lease for life by deed ; and, afterwards, he in the reversion, during the lease for life, devised the reversion and died, and then tenant in tail died without issue. The question was, Whether this devise was good or not ? and this depended upon, Whether, if tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so that it be a greater estate than tenant in tail can make, it be a discontinuance of the tail

Baker ver.
Hacking, Cro.
Car. 387, 405.

only, or a discontinuance of the reversion also ? and it was held to work a discontinuance in both, and then, the devisor having nothing in the reversion but only a right, the devise was void.

Carter 311.
Poph. 91, 92.
34, 35 H. 8.
Cap. I.

A freehold descendable *pur autre vie* also is not devisable by the statutes of wills ; for those statutes are confined to persons having manors, lands, tenements, or hereditaments of inheritance in fee-simple. From which it is plain, that the legislature had not this kind of estate in their contemplation ; for he that has a descendable freehold has not an estate in fee-simple.

Took vers.
Glacock,
Cart. 208. S.C.
1 Saund. 260.
et vid. Caſ-
ſandra's caſe,
Dyer 253.
Pl. 49. 1 Roll.
Abo. 334.

Thus where A. tenant in tail in reversion, made a lease for years reserving rent, to commence when the reversion came into possession, and then made a bargain and sale to B. and his heirs of the same lands, and B. made his will, and gave the lands to C. and her heirs ; it was determined that B. had only a descendable freehold, and not a fee determinable upon the death of tenant in tail ; and that such descendable freehold was not within the statutes of wills.

Sa'k. 619.
2 L. Raym.
778. et vid.
Co. Litt. 18 a.
10 Rep. 95.
Seymour's
caſe.

It is proper here to observe, that the above case has since been denied, not indeed in its principle, as applied to a descendable freehold, but as to the effect of the bargain and sale ; which Lord Holt, in the caſe of *Machel and Clarke*, was

was clearly of opinion created a base fee in the bargainee, not determined nor determinable until the entry of the issue; for tenant in tail himself has an estate of inheritance in him, which, before the statute *de donis*, was a fee-simple conditional, and the statute made no alteration as to tenant in tail himself, but only made provision that the issue in tail should not be disinherited by the alienation of his ancestor; and, therefore, as he might pass a fee before the statute, so he may since, the statute only making such estate voidable.

Upon the same principle, an estate to one *pur autre vie* is not devisable under these statutes. Thus, if tenant by courtesy grant over his estate, and the grantee deviseth it and dieth; this is a void devise, and out of the statute of wills.

And where one possessed of a lease for three lives, devised the same to his wife for life, remainder to his daughters, and, on their death without issue, remainder over; the better opinion seemed to be, that such estate was not devisable.

But now it is enacted, by the 29th Car. II. cap. 3. sec. 12. that estates *pur autre vie* may

Delaper's case,
cited Cro. Eliz.
58. Co. Litt. 41.
2 Roll. Abr.
150. Palm. 32.

Appleford
vers. Spencer,
3 Keb. 450.
Draper vers.
James, cited
ibid.
Verney vers.
Verney, 1 Vez.
428.

be devised by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, and attested and subscribed in the presence of the devisor by three or more witnesses.

^{3 Eliz. 3. tit.}
^{Dev. 21. cited}
^{Cro. Eliz. 805.}

But where land was devisable by custom, he who had such an estate might devise it; the reason of this distinction between devises by the custom and devises by the statute is, that the custom is general, "that every one seised of land may devise;" whereas the statutes are confined to manors, lands, &c. holden in fee-simple; the former of which descriptions is applicable to this kind of estate; but the latter is not so applicable.

And as the statutes of wills were held, on construction, not to extend to lands devisable by custom, so it seems doubtful whether the stat. 29th Car. II. cap. 3. sec. 12. extends to estates *pur autre vie*, devisable by custom; if it does not, the consequence will be, that a parol will, or, where the custom requires writing, a written will, though not executed according to this clause in the statute, will be sufficient to convey such interest, *sed quare*.

This

This kind of interest *pur autre vie*, may be entailed, and admits of a limitation over by way of remainder; because such a limitation of an estate *pur autre vie*, does not carry a conditional fee at common law, which could only be created out of an estate of inheritance, and the estate out of which such limitation issues, is but an estate *pur autre vie*; and therefore if such an estate *pur autre vie*, or for lives, be limited to one for life, remainder to her issue male, and for want of such issue, remainder over to B. the remainder to B. will be good on A.'s death without issue; for these limitations take effect as a description who shall take as special occupants during the life of *cestui que vie*, and so the latter differs from a possibility after a conditional fee, which could not be limited over at common law. It is the same, therefore, as if the grantor, instead of describing a wandering right of general occupancy, had said—I do appoint that, after the death of A. the grantee, they who shall happen to be heirs of the body of A. shall be special occupants of the premisses, and if there should be no issue of the body of A. then B. and his heirs shall be special occupants thereof.

But it is observable, that A. may, by any conveyance or even by articles in equity, bar his own heirs and those in remainder.

D 4

And

Wasteneys v.
Chappel.
1 Brown's Ca.
in Dom.
Proc. 457. S.C.
1 Atk. 525.
Norton v.
Frecker, ibid.
524. Baker v.
Bailey, 2 Vern.
225.

Low v. Barron
3 Will. 262.

Vid. Saltern, v..
 Saltern, 2 Ark.
 376. 10 Co. 982
 Blake v. Blake,
 3 P. Will. 4th
 ed. fol. 10.
 note 1 Duke
 of Grafton v.
 Hanmer, ib.
 266. no 8 E.
 Low v. Burron,
 3 P. Will. 265.
 Baker v. Bai-
 ley, 2 Vern.
 225 Finch v.
 Tucker,
 2 Vern. 184.
 Oldham v. Pic-
 kering, Salk.
 464 Ca. T.
 Holt 503.
 Carth. 376.

Sold. tit. of hon.
 b. 2. c. 9. sec. 5.

And it seems, that A. has not, *in this case*, such an interest in the estate *pur autre vie*, as he can devise by virtue of the statute 29th Car. II. cap. 3. or by custom, without first levying a fine, or doing some act to bar those in expectancy: For his heirs, claiming at common law as special occupants, favouring *of the nature of tenants in tail*, take in their own right, as it were *per formam doni*, and not merely as special occupants by descent from A.

Titles of dignity, likewise, as dukedoms, marquises, earldoms, viscountships, baronies, &c. while such dignities were the consequence of territorial possessions (as they seem in general to have originally been, having been annexed to lands, honors, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign) when the land was alienated, passed with it as appendant. And consequently, where such land was devisable by custom, passed by such devise. But the dignity of the peerage having, after alienations grew to be frequent, been confined to the lineage of the party ennobled, and held to be personal instead

of territorial, are not now alienable by devise or otherwise.

Offices likewise, being annexed to the person, fall under the like predicament. And coronies are of the same nature; so likewise are franchises, when annexed to the person, and not appendant to lands,

Also some entire franchises, though not immediately personal, yet, not being valuable, are not devisable by these statutes: Thus, if the franchise of *bona et catalla felonum, et fugitivorum, or utlagatorum, fines, amerciaments, &c.* within such a town or manor, be granted by the crown to one and his heirs, this franchise cannot be devised to another under these statutes.

The like law is of commons sans number, ways, and the like.

3 Rep. 32 b
10 Rep. 81 a
S. L. per Anderson, c. J.
and Periam. J.
Godbolt 17.

Per Anderson,
c. J. Cro. Eliz.
359.
2 Anders. 34.

The foundation of this distinction between hereditaments not valuable, and those that are valuable, seems to have been taken at a very early period, and arose from the particular wording of the statutes of wills. By the common law, without a custom, inheritances were not devisable. Every devise of them, therefore, not founded upon custom, must be warranted by some

some statute, otherwise the devise is void. Now neither of the statutes of wills, nor any other statute, made such a devise effectual; for, neither the letter nor the intent of the statutes of 32 Henry VIII. or 34 Henry VIII. authorised it; and to this purpose the words of the statutes should be observed, and particularly of the statute of the 32d Henry VIII. wiz. "That all persons having " manors, &c. held, &c. by *knight's service in capite*, might devise two parts of his hereditaments in three parts to be divided, or so much thereof as amounted to the *annual value* of two parts of them in three parts to be divided in certainty and by special division so that it might be known in severalty, for advancement of his wife, &c. and saving to the king the custody of so much of the inheritance as amounted to the *real annual value of the third part.*" Now these words did not reach this kind of thing; for, first, these were inheritances and things entire, not separable, and which could not be divided. Secondly, they were not of any certain annual value: and the statutes, by the first branch of them, required that the inheritances held in *capite* which were to be devised, should be of annual value. And the saving before mentioned shewed, that the intent of the statute was, that hereditaments devisable by that statute should be of annual value, which these sort of hereditaments

ments were not. And this appeared more evidently to be the law, by the words of the statute of the 34th Henry VIII. whereby it was enacted that, "if the hereditaments that descended to the heirs after such devise, did not extend to the *clear yearly value* of the third part, &c. according to the intent of the first statute, viz. the 32d Henry VIII. the king might take so much of the residue of the tenements, as should make the *value* of the third part with the full profits thereof; and that the division of that, &c. should be made as before was mentioned in the said statute."

From which parts of the statutes it appeared that the hereditaments, which these statutes provided for, were hereditaments which had parts and might be divided, so that one part might be severed from the other, and not such as could not be severed nor divided, and of which one part could not be severed or divided from the other part, and also *should be of annual value*, otherwise the devise of them would be void. And in support of this position, the opinion of *Prisot*, in a case 32d Henry VIII. 22, is cited by Lord *Coke*. There, upon a *quare impedimentum* brought by the king against one who made title to an advowson appendant to a manor of which he was seised by reason of his dutchy of Lancaster, the defendant pleaded, that, after the last continuance, the king, by his letters patent, ratified and confirmed to

3 Co. 332.

him, &c. all the right, &c. and that the said defendant ought not to be further disturbed, &c. and it was said that this plea was not good; and one reason alledged was, because by a statute of Henry IV. c. 6, “ Those who demanded of the king lands, tenements, rents, offices, annuities, or any other profits, should make express mention in their petitions of *the value* of the thing so to be demanded, and also of that which they have had of the king’s gift, or other his progenitors or predecessors before, otherwise the king’s letter patent thereof to be void and of no avail;” and although this were neither land nor tenement, yet, by the equity of the statute, it extended to all things that were *valuable*, and the church might be valued; and it was said that the advowson was valuable, for, that if a formedon were brought of it, and the tenant pleaded a release of the ancestor of the defendant, and that he had assets, &c. although that be only an advowson, it should be valued: so that when this were sued for by petition, it might be valued. And *Prisat*, as to this point, said, it had been alledged that if an office were granted by the king, it was necessary that the grant contained the value of the office, in some cases it was so and in others not: if here the office had been of any certain value, there perhaps it should be so, but if it were of a thing casual,

casual, then there was no occasion; as if the king granted a market, it was not necessary to state the value of it, because it was not annually certain. So, in the principal case, where the confirmation was of the church, it was not necessary for the party to insert the value, because it was not annually certain. From whence Lord Coke deduces this *principle*, that, when the law requires the value of a thing to be mentioned, it must be intended of a thing *which is of a certain yearly value*, and therefore concludes, that, as the statutes of wills authorise the devise of hereditaments held in *capite* valuable and devisable, none but such can, by virtue of those statutes, be devised: consequently, that the franchise of *bona et catalla felonum*, &c. not being valuable, are consequently not devisable.

Sed vide inf.
227.

An hereditament in a tombstone set up to the memory of a man's ancestors, or in trophies in a church, from their nature, seem not to be the subject of a devise.

Copyhold estates were not devisable at common law, nor are they become so by the statutes of wills; for, to pass copyholds by devise, there must be a surrender to the use of the last will and testament, which, alone, gives effect to the limitations therein. And when the uses are named

Royden v.
Malster,
2 Roll. Rep.
383. Coke's
Coph. 50.
Wood's Inst.
135.

named in the will, they take effect by the surrender and not by the will.

Vid. 1 Vez. 223.
422.

The grantor of an estate subject to a condition of re-entry, cannot devise the same, because the grantor that has the benefit of the condition vested in him, though he has an estate in the condition, yet *has* not the land *until* the condition broken. And the devisee over cannot take advantage of the breach merely as such; for the benefit thereof is not devisable, but must go in privity to the heir at law of the grantor, who must enter for it.

OF THE

Construction of the Devising Clause

IN THE

STATUTE OF FRAUDS.

TH E clause in this statute, that relates to the subject now under discussion, has for its object the adding such solemnities to the publication of wills as the legislature conceived best calculated to guard men *in extremis* against fraud, and to protect the legal heir from being disinherited by instruments executed by those, whose bodily strength might be sufficient to enable them to set their marks to dispositions of their property, the object of which their mental faculties were too weak to comprehend.

And with this view it is enacted, that "all
 " devises and bequests of any lands or tenements,
 " devisable either by force of the Statute of Wills,
 " or by that Statute (Statute of Frauds) or by
 " force of the custom of Kent, or the custom of
 " any borough, or any other particular custom,
 " shall be in writing, and signed by the party so
 " devising

" devising the same, or by some other person in
 " his presence, and by his express direction, and
 " shall be attested and subscribed in the presence
 " of the said devisor, by three or more credible
 " witnesses, or else they shall be utterly void and
 " of none effect."

The first material words in the clause are those which refer to the instrument, that it is the particular object of the legislature to regulate, viz. " all devises and bequests," upon which it is observable, that the legislature has not in this statute, as was likewise the case of the statutes of Henry VIII. prescribed any particular form of words in which an instrument, purporting a devise, should be conceived. From hence it follows that any paper writing, which would have constituted a valid devise before the statute of frauds, will be equally valid, as such, since the making of that statute, if the forms and solemnities required thereby attend its publication.

Brudenell *vers.*
Boughton, in-
 fra et 2 Atk.
 368.

And the opinion of Lord *Hardwicke*, in the case of *Brudenell* and *Boughton*, supports this construction of the statute. For his lordship, in giving judgment on that case, put the following one: Suppose a man made two wills, as was often done, the first executed pursuant to the statute of frauds, charging the real estate with his legacies;

legacies; the second giving general pecuniary legacies, but not executed pursuant to that statute, his Lordship made no doubt but that the legacies in the second will would be charged upon the land; and conformably to this opinion he decided the principal case. The conclusion that I draw from this case is, that, as, previous to the statute of frauds, any person might, by referring to another paper, make the paper so referred to part of his will, so may he, by a will subsequent to the statute, executed as the statute requires, refer to any other paper, and that paper, though not itself executed according to that statute, will thereby become part of his will; consequently, that any paper which before the statute would, either by reference or otherwise, have constituted a valid devise, will, since the statute, the instrument referring to it being duly executed, have the same operation.

Thus, in the case of *Hyde* and *Hyde*, the spiritual court having sentenced the second a good will of the personal estate, Lord Cowper held it a good will for the whole personal estate; and that such legatees of personalities in the first will, as were left out in the second will, must lose their legacies; but, for those that had legacies by the first will chargeable upon the real estate, if the

Hyde v. Hyde
infra.
et vid. Masters
et Masters,
1 P. Will. 423.
et Brudenell &
Boughton,
2 Atk. 274.
supra 19.

same legacies were devised to them by the second will, they should still continue chargeable upon the real estate, although that will was not executed to charge lands, provided such legacies were not increased or diminished by the second will. Which, in effect, was affecting the lands, by reference in a will executed to pass lands, with charges contained in an instrument not made with the ceremonies requisite for that purpose.

Vincent verf.
Stansfield,
3d. Feb. 1787,
in Chan.

So where S. H. seised in fee of divers freehold and copyhold estates, surrendered his copyholds into the hands of the lord, to the use of J. V. R. V. G. S. J. W. and G. R. their heirs and assigns for ever, in trust, and to and for such uses, intents, &c. and under such conditions, &c. as were or should be mentioned and declared concerning the same in and by the last will and testament of the said S. H. and, afterwards, the said S. H. by his will devised as well all his copyhold lands and estate in S. (which it was therein mentioned he had surrendered to his trustees, their heirs and assigns, to and for such uses as he by his last will should declare) as also all his freehold messuages, lands, &c. unto the said trustees, and the survivors and survivor of them, their and his heirs and assigns in trust, after raising certain sums in manner therein mentioned,

by

by good and effectual conveyances and assurances to convey his real estates remaining undisposed of to his grand-daughter, B. N. H. and her assigns for life *sans waste*, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to her daughters in tail, and in default of issue of the said B. N. H. as aforesaid, to convey the same to such person or persons, and for such estate, &c. as he, by deed to be executed in the presence of two or more witnesses, should appoint. The will was attested according to the statute: then by a deed poll S. H. appointed that, on the death of the said B. N. H. *sans issue*, the trustees should convey such remaining unsold real estates to the first and other sons of the body of the said S. H. by any woman he might thereafter take to wife (except A. W. &c.) in tail male, remainder to his daughters by any such woman in tail, remainder to the right heirs of the survivor of his trustees, his heirs and assigns for ever. This deed was attested by two witnesses only. And one question was, Whether the will and the deed, taken together, operated as a valid testamentary disposition of the freehold estates within the devising clause of the statute of frauds and perjuries, the deed poll being executed by two witnesses only? And it was held that they did, the will having,

by referring to the deed, consolidated both instruments, and operating in effect as if the limitations in the deed had been actually set out in the will.

The next material words in this clause are those, which are descriptive of the subject matter upon which the enacting part thereof is to operate, viz. "of any lands and tenements."

2 P. Will. 75.

And hereupon it has been determined, in the case of a devise of lands at Barbadoes, that this statute does not extend to such of our colonies and plantations as we were in possession of previous to the time of its passing; the principle of which decision is, that if there be a new and uninhabited country found out by English subjects, as the law is the birth-right of every subject, they, wherever they go, carry this law with them, and therefore such new found country is to be governed by the laws of England; but, after such country is inhabited by the English, acts of parliament, made in England without naming the foreign plantations, will not bind them.

But devises of lands in England, though made abroad, must be executed pursuant to this statute.

Thus,

Thus, where C. made his will abroad on his return from Persia, thereby devising lands in England, but the same was executed in the presence of two witnesses only; it was argued, and so held by the court, that the will must be void as to the land, there being but two witnesses thereto; for that the will being made beyond sea made no difference, it being of lands in England; since, if they passed by will, they must pass by *such* a will, and so circumstanced and attested, as the laws of England required.

Coppin *vers.*
Coppin,
2 P. Will. 291.

It is observable upon this part of the clause under consideration, that it does not extend to copyhold lands; for where an act of parliament altereth the service, custom, tenure, interest of the land, or other thing in prejudice of the lord or tenant, there the general words of such an act shall not extend to copyholds.

3 Croke, 44

Thus, where the devisor had written with his own hand a paper writing, having his own name in the beginning of it, purporting to be a disposition of an advowson, &c. and containing a residuary clause to this effect; “and all other his lands, &c. freehold and *copyhold* he devised to his nephew, his heirs, and assigns for ever,” and concluded thus, “In witness whereof I the said J. H. have to this my last will and

Roe ex. Dem.
Gilman *vers.*
Heyhoe,
2 Blackst. Rep.
1114, et vid.
Burkitt *vers.*
Burkitt,
2 Vern. 498.
Wagstaff *vers.*
Wagstaff,
2 P. Will. 259

"testament set my hand and seal, &c." and there was no seal or witnesses; it was insisted that this paper was no will, not being dated, executed, or attested. But by De Grey, Chief Just. *et curiam*, here is a surrender to the use of a last will, by which surrender the legal estate passes. The use is to be directed by the will. This instrument falls under that description. It is a last will good to convey chattels, twice signed by the testator, at the top and in the conclusion, and, as such, proved in the spiritual court. It is therefore a sufficient will to direct the uses of a copyhold, which need not be attested according to the statute of frauds.

² P. Will. 261.
Et vid. Ap-
pleyard ver.
Wood, Sel.Ca.
in Chan. 42.

In a case which came before the Master of the Rolls in Hil. vacation 1727, his Honor held, that if a copyholder was seised only of a trust or equity of redemption of a copyhold, and devised the same, there must be three witnesses to the will; for, in such case, there could be no precedent surrender to the use of the will to pass this trust, and the trust and equity of redemption of all lands of inheritance were within the statute of frauds and perjuries, otherwise great inconvenience would arise therefrom; and he said it was no prejudice to the lord of the manor to comprise the trust of a copyhold within that statute, because the person who had the legal

legal estate of the copyhold was tenant to the lord, and liable to answer all the services.

But where *cestui que* trust of copyhold lands devised them, without any surrender to the use of his will, and the question was, Whether the court would make that good? Lord Hardwicke was of a different opinion, and held, that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it *at least as easy to convey a trust as a legal interest.*

And the same point was again agitated before Lord Hardwicke, in the case of, the *Attorney General* and *Andrews*, and received a like determination.

This clause in the statute of frauds does not affect any disposition made of chattels.

But a term, attendant on the inheritance, has been considered within the spirit of this clause.

Thus, where E. W. possessed of the remainder of a term of 500 years for securing a sum of money lent on mortgage by the said E. W. to B. advanced a further sum upon B.'s granting a

Tuffnell vers.
Page, 2 P. Will.
261, in notes,
et vid. Atty.
Gen. v. Barnes,
2 Vern. 597.

Atty. Gen. vers.
Andrews.
1 Vez. 225.

Gilb. Rep. Eq.
169, 170.

Whitchurch v.
Whitchurch,
2 P. Will. 236.
1 Strange, 621.
Gilb. Rep. Eq.
168, Villeirs
vers. Villiers,
2 Atk. 72.

Goodright on
the Dem. of
Hoole, ver.
Salis,
2 Wils. 329.

further term of 1000 years in the premisses to J. W. in trust for E. W. Afterwards B. conveyed the inheritance of the same premisses to S. for a valuable consideration, who conveyed the same to E. W. Then E. W. made his will in his own hand-writing. But the will had neither a date, nor the name of the devisor subscribed thereto, nor was it executed in the presence of witnesses. It being clear that the inheritance could not pass by such an instrument, the only question was, Whether it was good at law to pass this term of 500 years, which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term which operated as a grant of the reversion for 1000 years and not as a grant of a future interest. And it was decreed by the *Master of the Rolls*, which decree was afterwards, on appeal to the Lords Commissioners *Gilbert* and *Raymond*, affirmed, that the term would not pass thereby; for that this was a term which would have attended the inheritance, and, in equity, have gone to the heir and not to the executor, and in that respect was to be considered as part of the inheritance; and a will not made pursuant to the statute of frauds would not pass any estate of which the heir, as such, would otherwise have had the benefit.

So,

So, likewise, a *trust* of an inheritance cannot be devised but by a will made according to this statute ; because, if the law were otherwise, it would introduce the same inconveniences, as to frauds and perjuries, as were occasioned before the statute, by a devise of a legal estate in fee-simple.

Adlington v.
Cann and
Andrews,
3 Ark. 152.

And, where W. seised of lands in fee, conveyed them by lease and release to trustees and their heirs to the use of them and their heirs, in trust, that, after such money raised as therein was mentioned, the trustees should convey the same to J. S. his heirs or assigns, or to such person or persons as he should direct. The monies were raised. Afterward J. S. by will, attested only by two witnesses, devised the lands to J. N. This instrument being clearly insufficient to convey the lands by will, an attempt was made to argue, that the trust being to convey them to such person as J. S. his heirs or assigns should direct, this will, though not good by way of devise, should however be effectual as an appointment. But the court interrupted the counsel, and adjudged the will void, and that the trustees should convey to the heir at law of the testator,

Wagstaff v.
Wagstaff,
2 Peer Will.
258.

Longford v.
Eyre, 1 P.Will.
240.

[58]

An appointment of land, under a power, if made by will, must be executed according to the statute of frauds, or it will not be valid; because, where a power is given to appoint the uses of land by deed or will generally, the will must be intended such an one as is proper for the disposition of land, consequently must be subscribed by three witnesses in the presence of the testator; for such case is within all the inconveniences that the statute of frauds intended to prevent.

And if a will, devising lands to an university, college, &c. be void, qua such, by reason of its not being executed according to this statute, it will not enure as an appointment under the statute of 43 Eliz. c. 4.; for a writing that imports a will, if void as a will, cannot operate as an appointment, the statute being to be taken strictly to prevent frauds at the time when, and in the pursuit of an object in which, people are easiest imposed on.

Attorney Ge-
neral v. Barnes,
2 Vern. 597.
et vid. Wagstaff
et Wagstaff,
supra.

Thus, where A. a member of Sidney Sussex College, Cambridge, by will in writing, devised his lands to the college upon trust for certain charities therein mentioned, and by a codicil gave other charities; and there were no witnesses to the will, but there were three witnesses to the codicil, who subscribed in the testator's

tator's presence ; it being agreed that, as to the freehold, the will, as a will, was void, the next question was, Whether, admitting it void as a will, it might not operate as an appointment ? and it was held that it could not.

And where a sum of money was given originally and primarily out of land, it was clearly held that a will, creating such charge, must be executed with all the solemnities necessary to a devise of the land itself ; because it was considered, in a court of equity, as a devise of part of the land, since it could only be raised by sale or disposition thereof.

*Brudenell v. C.
Boughton,
2 Atk. 268,
285. supra 19.
49.*

So rents arising out of land, partake of the nature of the land, and follow that, and consequently are all within the purview of this statute.

And a man cannot give a power to his executors to sell his lands, by a will not executed according to the statute.

2 Vez. 179.

This clause then goes on to state, what kind of devises of lands and tenements shall be within its purview ; namely, " those devisable either " by force of the statutes of wills, or by that " statute (*viz.* the statute of frauds) or by force " of the custom of Kent, or the custom of any " borough,

"borough, or any other particular custom ;" and requires four solemnities to the making of wills respecting lands so circumstanced. Namely,

First. That they should be in writing.

Though this be the first solemnity required by this statute in the making a will, it was, in fact, an unnecessary provision as to all lands, except those which were devisable by custom or otherwise previous to the statutes of wills ; devises of lands made devisable by the statutes of wills being thereby required to be in writing. It applies therefore particularly to lands of the former description, which, being left by the statutes in the same situation in which they were at common law, continued, where so authorized by custom, devisable by parol : And to prevent the frequent perjuries which were committed by putting words into testators mouths that had never been spoken by them, it enacts generally, that *all* devises shall be *in writing*.

The second solemnity, appointed by this clause, is, "that the will shall be signed by the party so devising the same, or by some other person in his presence, or by his direction." The latter part of the clause was inserted in favour of persons who by accidents had lost their hands,
or

Skepwith's
case, Godb.
14, 15.

or who by blindness, palsy, or other diseases incident to the human frame, were incapable of performing this ceremony themselves.

The ceremony of signing, used by the civil law, seems to have been chosen rather than that of sealing and delivering, which was the feudal solemnity attending the execution of deeds, because the seal, which had been formerly a great mark of distinction in families, was not so at the time of this statute's being passed ; and the form of sealing and delivery had not so strong a tendency as signing, to effect the great purpose of this clause, *the discovery and prevention of frauds.*

Gilb. Rep. Eq.
261.

Few years elapsed after the making of this statute, before doubts were entertained in Westminster Hall, as to what the legislature meant by the word "signing;" namely, whether it should be construed in its strict sense, and, by analogy to other instruments ; or, whether it should be liberally expounded, and left open as a question of construction upon intention, to be inferred from the facts and circumstances attending each particular case ?

The first case in which this became a question was that of *Lemayne* and *Stanley*, in the 33d year

Lemayne v.
Stanley.
3 Lev. 1. S. C.
3 Mod. 219.

^{1 Eq. Ca. Abr.} ^{403, 9.} year of the reign of Charles II. It arose upon a trial in ejectment ; and the case, as found upon a special verdict, was this : *Stanley*, seised in fee, by will in his own hand-writing beginning thus, “ In the name of God, amen—I *John Stanley* make this my last will and testament,” devised the lands in question ; he had not subscribed his name thereto, but only put his seal ; this instrument was subscribed by three witnesses in his presence : and the question was, Whether this was a good will, *quo-ad the lands* ? and the reporter states, that, after many arguments, it was adjudged by the court (namely, *North*, *Wyndham*, *Charleton*, and *Levinz*) that it was a good will ; for, being written by the testator himself, and his name being written therein, that was a sufficient signing within the statute, which did not direct whether the will should be signed at the top or bottom, or in the margin ; and therefore, it was said, signing in any part thereof was sufficient.

Ibid.

And it was further held by *North*, *Wyndham*, and *Charleton*, that putting his seal to it had been a sufficient signing within the statute ; for that *signum* signified only a mark, and sealing was a sufficient mark that such instrument was his will ; but of this *Levinz* doubted, and cited a case from 1 Roll’s Abridgement, 245. 25.

of

of a submission to an award, *ita quod* it was made, signed, and delivered; an award was made and delivered, but not signed, and it was held a bad award: But the court agreeing upon the former grounds, judgment was given accordingly.

This construction upon the word "signed," in the clause, was apparently contrary to the natural import and common received interpretation thereof, and opened a door to endless litigation upon the other words in the clause; for it will be found that this word, taken in its ordinary sense, is a complete key to all the other words in the clause; respecting which, in consequence of this determination upon the word "Signing," so many questions have already arisen, and so many still remain to be determined.

The word "SIGNING" conveys to a common ear, not versed in the subtlety of technical reasoning, a mere simple idea; viz. the writing the name of the agent at the bottom of the act, thereby *formally* authenticating it as his; it requires the ingenuity, therefore, of a schoolman, so far to wrest this word out of its natural sense, as to construe it to mean the *recital* of a name in any part of an instrument, where common form or accident may happen to introduce it.

Nothing

Nothing but the strong bent of the times in favour of this mode of alienation, which equally pervaded the courts of law and the people, and which had induced that loose construction of the word “*writing*” in the statutes of wills, that rendered the statute of frauds necessary, could have given colour to the argument in favour of such a construction; but the disposition to encourage alienation by wills prevailed so much at this period, that the ingenuity of the advocate in explaining away, by construction, the excellent provisions made by this clause to prevent fraud, could only be equalled by the avidity with which courts received and supported such exposition.

But, if the devisor intend to sign the instrument in form, and begin so to subscribe his name, but, being overtaken by weakness or incapacity before he has completed that intention, become incapable of executing his purpose, this will not be a signing within the act. For although, where the intention of the testator is clear, and the transaction fair, courts of law will endeavour so to construe the circumstances as to give effect to the intention, and not suffer a good will to be avoided by a slip in form; yet they cannot so far explain away the statute, as to give effect to a constructive signing upon a presumed

presumed intention, where there is positive evidence to contradict that presumption.

Thus, where a will was prepared in five sheets, and a seal affixed to the last, and also the form of attestation written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third, but, being unable from the weakness of his hand, he said "he could not "do it; but that it was his will;" and, on the following day, being asked if he would sign his will, he said, "he would," and attempted again to sign the two remaining sheets, but was not able so to do. The Court of King's Bench seemed to be of opinion, that this was not a signing; for the testator, when he signed the two first sheets, had an intention of signing the others, he therefore did not mean the signature of the two first sheets as the signature of the whole will; consequently, there never was a signature of the whole, but only a beginning to sign. But the case was determined upon another question.

Right v. Price,
lessee of Cater,
Dougl. 241.

The distinction between the last case and that of *Lemayne* and *Stanley*, furnishes two principles of construction on this branch of the clause; namely, first, that if the intention to devise be certain, and the requisitions of the statute be

verbally complied with, the law will imply an intention in the testator to conform to the statute, and, by coupling the fact and the intention, give effect to the instrument. Thus, in the case of *Lemayne and Stanley*, the intent to devise was certain, and the name of the testator was *de facto* on the instrument; the court therefore, the statute not having pointed out where the signing was to be, to give effect to the devise, implied an intent to sign at the outset of the will. Secondly, that, although the statute be *verbally* complied with, yet, if the *express intention* of the testator be to carry the requisitions of the statute into execution *formally*, but an accident intervenes to prevent him, the court cannot, by construction, supply the defective execution. Thus, in *Night and Prize*, though the intention that *that* instrument should be the testator's will was clear, the court could not raise an intent in the testator by *implication*, that signing the first sheet should be a signing the last; because the intent of the testator to sign *all* the sheets was *express*, and so not open to presumption.

*Lemayne v.
Stanley, supra
61.*

The court having, in the case of *Lemayne and Stanley*, rested their decision, in favour of the will, upon the ground of the testator's having signed his name thereto, the observation, thrown

thrown out in that case, as to sealing being signing, must be considered as a *dictum* of the court merely, and not as a formal decision on that point. And no question seems to have been made thereupon from that period until the 13th George I. when, from a short note in *Strange*, it appears to have been agitated before Lord *Raymond*, on an issue out of Chancery *devisavit vel non*; and it is stated by the reporter to have been there determined by his Lordship, that *sealing* a will is a *signing* within the statutes of frauds and perjuries.

Warneford v.
Warneford,
2 Str. 764.

But this doctrine appears to have been very much doubted in a subsequent case, in the 25th of George II. in which Lord Chief Baron *Parker*, Baron *Clive*, and Baron *Smith* (*absente Legg*) are reported to have said, that what is said by *North*, *Wyndham*, and *Charlton*, in 3 *Lev. i. viz.* "That putting a seal to a will " is a sufficient signing within the statute of " frauds" is a very strange doctrine; for that, if it were so, it would be very easy for one person to forge any other's will by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand. And the barons said, that if the same thing should come in question again, they would

Smith v. Evans,
1 Wilson 313.
et vid. Gryle v.
Gryle, infra

not hold that sealing a will only was a sufficient signing within the statute.

The third and fourth solemnities required by this statute are, the “*attestation*” and “*subscription*” in the presence of the devisor, by three “or more,” &c.

One principal evil meant to be remedied by the framers of the clause now under consideration, was the secret and private manner in which wills were executed previous thereto, and the frauds consequential thereupon; with a view to check which, the clause introduced a third ceremony to be observed in the making of wills; namely, that the signing of the instrument should be “*attested*,” &c.

In the application of this word “*attested*” to the act of executing the will, the legislature has been considered, in the construction of it, as having called the attention of the persons attesting to *three* several objects; one of which applies to the testator himself, the other two to the instrument. First, that which relates to the testator, is with regard to his sanity; an attention to which in the witnesses, is a necessary inference, as well from the nature of the transaction, as from the objects of the statute.

The

The name of the instrument necessarily imports, that there must be a capacity of disposing in the devisor at the time of executing thereof; and that is so essential to its validity, that a formal declaration of his sound and disposing mind is become the introductory clause in such instruments. In the construction of this statute, therefore, it has been held that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing; for it was not merely the abstract act or form of signing that the legislature required as *one* necessary solemnity to the constitution of a devise, for an ideot or lunatic might put his name to an instrument, and yet be perfectly ignorant of its contents; but the legislature, in the word "*signing*," comprehended another idea, namely, signing an instrument intending it to be a will, consequently the mental power or capacity of willing was necessary, as well as the corporal power of putting the mark or name, to constitute a signing.

The business, then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to *try, judge, and determine* whether the testator is *compos* to sign. In equity, therefore, the sanity of the devisor must be proved, which is

Harris v. Ingledew,
3 Will. 93.
Cand. Arg.
23.

one reason why a will can never be proved as an exhibit, *vivid voce* in Chancery, though a deed may ; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that court, never to establish a will unless all the witnesses attesting are examined ; because the heir has a right to a proof of sanity from every one of *them*, whom the statute has placed about his ancestor.

Wallis v.
Hodgson,
on Bill of
Exceptions,
2 Atk. 56.

In conformity with this doctrine, it was said by Lord Hardwicke, in the case of *Wallis* and *Hodgson*, that it had been determined over and over, that the *advisee* must shew the deviser to have been of sound and disposing mind when a will was to be established as to real estate ; proving that it was well executed, according to the statute of frauds and perjuries, was not sufficient.

But Lord Hardwicke added, in the last case, that if they could have produced evidence on the part of the plaintiff, of any act having been done under the will relating to the real estate, he would have dispensed with the rule, being a mere matter of formality. *Sed quare.*

And a will was set aside after forty years possession under it, upon account of the *insanity* of the devisor, although in prejudice of a purchaser.

Squire v. Per-
shall, 8 Vin.
Abr. 169. Pl.
13.

But the liberal construction which the courts put upon the word "signing," necessarily raised a question upon the import of the word "attesting," as applied to the instrument; namely, Whether the witnesses were to attest the very act and *factum* of signing, or whether an acknowledgment by the testator, that the act was done by him, and that it was his hand-writing, was not sufficient to enable the witness to attest? for, it was contended, that this word should receive a construction agreeable to the law and rules of evidence in other cases, and that, as an attestation upon an acknowledgment was good in every other case, so, in this, an attestation on the acknowledgment of the testator that it was his hand-writing, should be an attestation of the act of signing.

And this, indeed, is a necessary conclusion from the decision in the case of *Lemayne* and *Stanley* before stated; for, in that case, it could not have been otherwise, unless it be presumed that the testator wrote the will in the presence of three witnesses, which, had it been so, would

Lemayne v.
Stanley, Skin-
ner 227, supra
61.

have been found by the jury, as it would have put an end to all doubt upon the question.

Parsons v. Cook,
Pre. Ch. 184.
H.L., 1701.

But, in the case of *Parsons* and *Cook*, the Lord Keeper seems to have entertained some doubt upon this point. In that case, the will was written with the testator's own hand, and published in the presence of three several witnesses at three several times, and they all attested in the presence of the testator; but he did not sign it in the presence of the second witness, but desired him to attest the will. And one question being, Whether the devisor's owning the subscription to be his was sufficient? His Lordship doubted, and it being a question of law, ordered it to be tried; but I find no further report as to what came of this case.

Dormer vers.
Thurland,
P. Will. 506.

The same question was again agitated in the case of *Dormer* and *Thurland*; but, the case being determined on another point, no decision was made upon it.

Smith vers.
Codron, cited
2 Vez. 455.
7 July 1732.

The point was then brought before Sir *Joseph Jekyll*, in the case of *Smith* and *Codron*. In that case, A. signed and published a will in the presence of two persons who attested it in his presence, then a third person was called in, and the testator, shewing him his name, told him that was his

his hand and bid him witness it, which he did, and subscribed his name in the testator's presence: and the testator, two hours after, told him, that the paper he had subscribed was his will. And his Honour held this a good execution.

So, where, in proving a will disposing of a real estate, there was full proof that the three subscribing witnesses did subscribe their names in the presence of the testatrix, but one of them said he did not see the testatrix sign, but that she owned, at the same time the witnesses subscribed, that the name signed to the will was her own hand-writing; his Honour the Master of the Rolls held this to be, without doubt, a sufficient signing and attestation.

Stonehouse v.
Evelyn,
3 P. Will. 253.

And the decision of Sir Joseph Jekyl, in *Smith and Codron*, was mentioned and confirmed by Lord Hardwicke in the case of *Grayson and Atkinson*, in which the same point was brought before his Lordship for his opinion.

Smith v. Co-
dron supra,
Grayson ver.
Atkinson,
2 Vez. 454.

But, where a will was executed first in the presence of two witnesses, and, afterwards, the testatrix said, "This is my will," in the presence of a third, and desired he would attest it, but did not put her seal nor acknowledge that her name was of her own hand-writing; Lord Hardwicke

Gryle v. Gryle,
2 Atk. 182. et
vid. Doug.,
last ed. 244.

wicke gave no absolute opinion, but was inclined to think this was a void will, because it was not exactly conformable to the statute of stands and perjuries; for it should have been resealed by the testatrix in the presence of the third witness, and she should have acknowledged it to be her hand-writing.

And, in this case, his Lordship doubted whether sealing, in the presence of the third witness, would have been sufficient to make this a good will.

If the word "Attested," made use of in the clause, is to receive a construction by analogy to the exposition of this word, as applied to deeds, it cannot be carried further than to give effect to a signing, *upon an acknowledgment* thereof by the testator. The essential parts of a deed are writing, sealing, and delivery; and, if these ceremonies are complete, the instrument will be valid in law: The practice of signing a deed seems to have been unnecessary until the distinction which originally belonged to seals became obsolete; then it became requisite that some form should be interposed, by which the seal might be identified, and the art of writing having become common, no mode suggested itself so naturally as that of appropriating the seal, by annexing

annexing the name of the grantor in writing to the symbolical solemnity of sealing. It followed, upon the introduction of this mode, that by proving the signing the sealing was proved, the signing being the identification of the seal; consequently, the acknowledgment of the signing by the grantor in a deed to a witness, attended with the formality of a semblance of sealing, and the fact of delivery, were a sufficient evidence for a jury to find the execution of a deed. Hence it became unnecessary to examine an attesting witness to a deed further than as to the acknowledgment of the signing; because the deed had its efficacy from the sealing and delivery, of the existence of the former of which the signing or acknowledgment of the signing, which amounted to an adoption of the seal, accompanied with the formal semblance of a sealing was presumptive evidence; and the latter of which it was necessary the witness should prove. If the witnesses were dead, their attestation was considered as evidence of these facts having accompanied the transaction. If there was no attestation, that not being of the essence of a deed (in which it differs from a will under the statute of frauds) the act rested upon the instrument itself, and the best evidence of the existence of the fact of delivery, that the nature of the case would admit. I should apprehend proof
of

of the hand-writing of the grantor opposite the seal, and of an acknowledgment by him that it was his deed, would be sufficient, since the acknowledgment of the instrument as his deed would, *necessarily*, imply a delivery, and the proof of his hand-writing opposite the seal be sufficient ground from whence to conclude a sealing.

Sealing, then, at the time of the making this clause, being no longer a mark of distinction, except in so much as the sealing was identified by the signing; those who formed it rejected the ceremony of sealing, which was become merely formal, and adopted that of signing, which was *then* the substantial part of sealing. Signing therefore is, as to the purposes of this statute, to be considered as analogous to sealing in common law conveyances, and the same evidence which was required to prove a sealing at the time when this clause was passed, was considered as sufficient to prove a signing within it. The evidence of one who saw the donor write his name and thereby identify the seal, accompanied with the semblance of a sealing, or, of one to whom the donor had acknowledged that the name which identified the seal was his writing, accompanied with the semblance of a sealing, was a sufficient proof of the identity of the seal; by analogy, then, proof of the actual signing of the will, or of

an acknowledgment of the devisor that the signing is his, is a sufficient evidence of signing, and warrants an attestation of that fact; proof of the acknowledgment of that fact being considered in law as a proof of the fact itself, as proof of acknowledgment of the seal, would be a proof of the fact of sealing; the seal itself being no longer distinguished so as to identify the instrument.

But as, in the case of sealing, it was not sufficient to prove the seal to be that of the donor, without proving the semblance of sealing, or an acknowledgment of the seal, (the latter of which is now proved by proving the signing and the semblance of sealing) because the seal might be forged; so is it necessary, in the case of signing, that the attesting witnesses to a will should prove the actual signing by the testator, or the acknowledgment thereof by him, because the signing might be forged.

Then as the word "sealing," as applied to a deed at common law, contained in itself a complex idea; namely, that of a person to seal, a seal applied, and an instrument to take effect from the sealing; so the word signing, as applied to a will, contains in itself a complex idea, viz. a testator to sign, an actual signing or acknowledgment thereof, and a devise signed; and as a sealing.

sealing might be identified by the acknowledgment of the grantor, &c. so a signing may be identified by an acknowledgment of the devisor.

However, here it is necessary to observe that, upon this question, whether an actual acknowledgment of the hand-writing of the devisor was absolutely necessary or not, a distinction seems to have been taken where this point came under the consideration of a jury, upon a question as to the fact, and, where it was stated in proof before a court of equity on a question of law; for, in the former case, judges seem to have been of opinion, that an implied acknowledgment from a written declaration was sufficient to warrant a jury to presume the fact, and find such will well executed.

Skinner 227.

And this appears to be the effect of what is reported to have been said by Lord Jeffries upon a question on this point, which arose at a trial at bar, in the 36 & 37 Car. II. viz. that a will written all by the testator's own hand, and declared in the presence of three credible witnesses, would be within the intention of the act, though not signed by him (according to the words of the act) in the presence of three credible witnesses.

Peate *vers.*
Ougly,
Comyns 297.

But this point came immediately under the consideration of Lord Trevor, in the case of *Peate v. Ougly*,

v. Ougly, on an ejectment. In that case it appeared in evidence, that the instrument was written by Oliver St. John, Earl of Bolingbroke, the devisor. These words were also written in his handwriting, viz. "signed, sealed, and published as my "last will and testament in the presence of," and then the names of the three witnesses were subscribed; two of them were dead, and the third, who was produced at the trial, deposed, that he had been a servant to his lordship, and that, about twenty-eight years before, he and the other witnesses were called up in the night, and ordered into the earl's chamber, who produced a paper folded up, and desired him and the others to set their hands to it as witnesses, which they did *in bis presence*; but he deposed, that they did not see any of the writing, nor did the earl tell them that the instrument was his will, or say what it was, but he believed this to be the paper, because his name and those of the other witnesses were to it, and he had never witnessed any other paper for the earl; but that he had often seen the earl write, and believed the whole of the instrument to be of the earl's writing. And it was objected, that this will was not good within the statute of Charles the second; for, that required the witnesses to attest the signing by the devisor, or, at least, the publication of the will, neither of which had been done in this case. But it was replied,

replied, that it was well executed; for, that it was sufficient if the testator wrote these words, “*SIGNED, sealed, and published as his will,*” and requested the witnesses to subscribe their names to it, and that they need not hear the devisor declare it to be his will: and a case was cited, determined by Lord *Schaftsbury* before the statute, where a man, having written a will with his own hand, and also these words, “*SIGNED and published in the presence of,*” and no witnesses had subscribed it, it was held well published. And in the principal case Lord C. J. *Trevor* inclined to think that the evidence was sufficient to find it well executed, and the jury found it accordingly.

*Stonehouse v.
Evelyn, 3 P.
Will. 254.*

However it seems doubtful, whether there must not be an actual acknowledgment of the signing to one of the witnesses to warrant the attestation; for it is said, in the case of *Stonehouse and Evelyn*, that it is sufficient if ONE of the three witnesses swears that the testator acknowledged the signing to be his own hand; from whence it seems a necessary inference, that such an acknowledgment, at least, is necessary to support the attestation.

As to the second object relating to the instrument; viz. the publication, the courts, in construing the statute, have held that, since as the law

law stood before the statute of frauds, publication of a will was an essential part thereof, and there was nothing in that statute to take it away; the devisor must still do some act materially declaring the instrument to be *his* will, though no particular form of words is necessary. Any act or declaration, importing a solemn intent in the testator to dispose of his estate, will be sufficient; but without some such act or declaration, the instrument will not be good as a will. This was held to be the law by Lord *Hardwicke*, in the case of *Ross and Ewer*; and, in support of that opinion, his lordship cited the case of Mr. *Windham* of Clearwell, which occurred in the Court of King's Bench. It was a trial at bar on the will of his uncle; and the only question was, Whether the testator published it? for, his lordship said, there was no doubt of his having executed it in the presence of three witnesses, or of their attesting it in his presence; which shewed that publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form.

Ross v. Ewer,
3 A&R. 156.

But no particular form of publication being necessary, delivery as a deed has been held a sufficient publication of a will.

8 Vin. Abr. 125.
Pl. 13.

Thus, where the witnesses were deceived by the testator at the time of the execution, and were

Trimmer v.
Jackson,
Burn's Ecc.
Law, 117.

led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will; for it was delivered as his act and deed, and the words, "*sealed and delivered,*" were put above the place where the witnesses were to subscribe their names: It was adjudged by the court, as it is said, for the inconveniences that might arise in families from having it known that a person had made his will, that this was a sufficient execution.

Swinb. 52.
God. O. L. 66.

So, if the devisor shew the will unto the witnesses, saying "This is my last will and testament," or, "herein is contained my last will," this is sufficient without making the witnesses privy to the contents thereof, provided the witnesses be able to prove the identity of the writing: that is to say, that the writing shewed is the very same writing, which the testator in his life-time affirmed before them to be his will, or to contain his last will and testament.

And a publication may be inferred from circumstances, and will have the same force to render the instrument valid, as if expressed by parol declaration.

Wallis *versus*
Wallis, 4.
Burn's Ecc.
Law, 114, et

Thus, in the case of *Wallis* and *Wallis*, which came on at the assizes for Lincoln before Mr. Justice

Justice Denison and a special jury, the facts were these: W. made his will in his own hand-writing, thereby devising his real estate, and the form of attestation was in these words, "*signed, sealed,
published, and declared for the last will and testa-
ment of the said W. in the presence of us,*" I. M. J. W. and W. P. The heir at law brought an ejectment; and, to prove the will, the devisee produced W. P. one of the three subscribing witnesses, who deposed, that about July 1760, J. W. then butler to W. the devisor, came and told him that he must come to his master; that, upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him and the said J. W. and I. M. (then his housekeeper) up to the table to him, where they all came; then W. further addressed himself to them all, desired them *to take notice*, and then took a pen, and, in all their presence, signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto, which they all did, by the direction of the said W. in his presence, and in the presence of each other, he shewing them severally where to write their names. But that the said W. otherwise than as above, did not declare or publish either part to be his will, or say what it was. The counsel for the plaintiff

vid. Peate vid.
Ougly, supra.
73.

contended, that this was not a sufficient proof, by one witness, of a complete execution of the will; and they produced, on the other hand, the other two subscribing witnesses, who, in many particulars, did not give a clear and distinct evidence; and could not recollect whether they had signed one or two papers; or whether then, or at any time before the said W.'s death, they understood what they had so witnessed to be W.'s will, though J. W. seemed to admit he conjectured it so to be. But both J. W. and I. M. swore that they did not see the said W. either sign or seal any part of his will; that P. the other subscribing witness, was not at that time in the room, when (at the said W.'s desire) they wrote their names to the two papers as they then appeared; that W. did not declare or publish it as his will, nor did they know it to be a will. The counsel for the devisee then called R. P. the testator's groom, who swore, that one morning, in the beginning of July 1760, J. W. told him, that his master had much wanted him, and that, upon his the said R. P.'s offering to go to his master to receive his orders, J. W. told R. P. that he business was done, and that J. P. had supplied his place, and that he the said W. P. J. W. and I. M. had that morning been witnessing their master's will. And S. being called, swore, that in the beginning of July

1760,

1760, I. M. came one morning after breakfast into the kitchen, and told her that she, and J. W. and W. P. had that morning witnessed their master's will, though he had not told them it was so. Upon the state of the evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, publication of a will was an essential part thereof; and, if so, there was nothing in that statute to take it away: and it was further insisted that, by the said statute, one requisite to a good and valid devise of lands was, that it should be attested and subscribed in the presence of the devisor by three or four credible witnesses, and that the words *attested and subscribed* must import, that it should be published as a devise or will by the testator, in the presence of the witnesses. On the contrary, for the defendant it was contended, that neither before nor since the statute, publication was necessary; and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator's using these significant words to all the witnesses when he called them up to the will, "*take notice,*" and then signing both parts of his will, and then de-

Supra. 78.

Giving both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witnesses did, was a sufficient execution and publication of his will; the words "*signed, sealed, published, and declared,*" being all written in the testator's own hand-writing, and the witness P. swearing that both parts of the will lay open to the inspection of all the witnesses when they subscribed their names, and it appearing, by the evidence of P. and D. that both the other witnesses had declared that they had been attesting W.'s will. And they said that this was a much stronger case than that of *Peate and Ougly*. And Mr. Justice *Denizon* was of opinion, that, if the witnesses for the defendant were credited by the jury, this was a due execution within the statute, and a sufficient publication; and the jury found accordingly for the defendant. But the plaintiff's counsel insisted that the point, whether a good publication or not, should be reserved for a case to be argued above. However, the matter was compromised on the defendant's remitting the costs.

As the ceremony of signing a will has been considered as analogous to the ceremony of sealing a deed; so the solemnity of publication of a will seems

seems to be analogous to the ceremony of delivery of a deed. In truth it appears extraordinary that the framers of the will clause in the statute of frauds should have omitted the insertion of this solemnity among the others required, nor is such neglect to be accounted for. I rather impute the not inserting it to an apprehension in them, that the ceremony of signing, required thereby, would be construed to mean an actual signing by the testator, in the presence of *all* the subscribing witnesses; in which case, it should seem, there would have been no necessity for the addition of any further ceremony to secure the testator and identify the instrument, as the whole must *then* have been one entire transaction.

It is necessary that the whole will should be present at the time of attestation; for, if a man make a will in several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the first, this is not a good will.

³ Mod. 263.
¹ Eq. Ca. Ab.
423, 7.

But, unless there be positive proof that the entire will was not in the room, whether it was so or not, is a question of fact for the consideration of the jury, on the particular circumstances of the case.

Bond. et al. v.
Seawell et al.
3 Burr. 1773.
S. C. Blackst.
Rep. 407, 422,
454.

Thus, where it was proved that C. made his will, consisting of two sheets of paper all of his own hand-writing, and signed his name at the bottom of each page ; and that he also made a codicil of his own hand-writing upon one single sheet, and called in H. shewed him both the sheets of his will, and his signature to every page thereof, and told him that was *bis will* ; and then shewed H. the codicil, and desired him to attest both the will and codicil : which he did, in the presence of the testator, and in the manner appearing upon the face of the instrument, and then went out of the room. V. and L. came in immediately afterwards, and the devisor shewed them the codicil, and the *last sheet of the will*, and sealed both before them. C. then took each of them up severally as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but NEVER SAW *the FIRST sheet of the will*; nor was THAT *sheet* PRODUCED to them; nor was the same, or any other paper, UPON THE TABLE. Both the sheets of the will were found with the codicil in the testator's bureau, after his death, all wrapped up in one piece of paper ; but the two sheets of the will were not pinned together. And the question upon these facts was, Whether this will was duly executed according to the statute of frauds? After three several arguments before the

the Court of King's Bench, and one argument before all the Judges in the Exchequer Chamber, Lord Mansfield delivered the judgment. His lordship said, that the question made at the trial, and submitted by the case, as it then stood, turned upon the solemnity of *the execution*; and they were of opinion, "that the due execution of this will could not be come at, in the method wherein the matter was then put;" that if this were considered as a special verdict, they thought it was defectively found as to the point of the *legal execution* of the will; that every *presumption* ought to be made by a jury, *in favour* of such a will, when there was no doubt of the testator's intention; and that they all thought the circumstances sufficient to *presume* that the first sheet was *in the room*; and that the jury ought to have been so directed: but, upon a special verdict, nothing could be presumed; therefore they were all of opinion, "that it ought to be tried over again;" and if the jury should be of opinion, "that it was then *in the room*," they ought to find for the will generally, and they ought to *presume*, from the circumstances proved, "that the will *was* in the room,"

The fourth ceremony required by the statute is the "subscription;" and as to this it has been held, that a man may make his will in several writings,

Carth. 37.
3 Mod. 263.
agt. 1 h
counsel, and
attended to by
Dolbin, et vid.

³ Burr. 1775.
² Blackst.
Com. 410.

writings, and at several times; and that if a will were written in three several sheets of paper not tacked together, and subscribed by three witnesses, severally, one name to each sheet, this would be a good will within the statute.

So, if such loose sheets of paper are wrapped up in a clean sheet of paper, and the witnesses subscribe their names to that clean sheet, this, it is said, will be a good attestation of a will.

The next doubt that occurred on the construction of this act, was, on the words, "in the presence of the testator;" and in expounding these words the courts have held the words, "in the presence," as synonymous to *within the view*; and, consequently, that if the witnesses subscribe within the view of the testator, that is a good subscribing according to the statute of frauds.

Sheers v. Glasscock,
Salk. 689,
Cartl. 81,
Eq. C. Abr.
403. Pl. 5.

The first case, in which this point came in question, was that of *Sheers* and *Glasscock*. The facts were, Sir George Sheers being sick in bed, made his will and signed it in the presence of three witnesses, but, he being very ill, the witnesses withdrew into a gallery, between which and the chamber where the testator lay, there was a lobby with glass doors and the glass broken in some places:

places: in this room the witnesses subscribed the will. It was proved, that the testator might have seen, from his bed where he lay, the table in the gallery on which the witnesses subscribed, through the lobby and the broken glass windows: and this was adjudged a good will to pass lands; for, the statute required attesting in his presence to prevent obtruding another will in place of the true one, it was therefore enough if the testator *might* see, it was not necessary that he *should* actually see the signing; because if that were the case, if a man did but turn his back, or look off, it would vitiate a will; here the signing was within view of the testator, he might have seen it, and that was enough.

So, where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door and the door of the room where the testator lay were open, so that he might have seen them subscribe their names if he would; that was held sufficient, though there was no proof that the testator did see them subscribe; for it was possible that the testator might have seen them subscribe.

Davy and
Nicholas v.
Smith, Saik.
395.

And, in the preceding case, it was said *per curiam*, that if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed be drawn close, it is a good subscribing; because it is in his power to see them, and what is done shall be construed to be in his presence,

*Cotton v. Dade,
Brown's Rep.
Ch. 99.*

Nor is it necessary that the testator should be in the same house with the witnesses; for where a feme covert, having power to make a writing in the nature of a will, ordered such an instrument to be prepared, and went to her attorney's office to execute it, but, being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it, and the carriage was put back to the window of the office, through which it was sworn, by a person in the carriage, the testatrix might have seen what passed: the Lord Chancellor was of opinion, that the will was well executed.

But, though the signing be in a room or chamber immediately contiguous, yet the devise will be void, unless the testator is in a position in which he can, if he please, without changing his situation, see the witnesses subscribe.

Thus

Thus where, on a trial at bar, the defendant in ejectment claimed under a will duly executed according to the statute of frauds ; and the plaintiff, in order to set aside that will, produced a subsequent one subscribed by three witnesses, who themselves proved that the testatrix signed it in their presence, but that they did not subscribe it in her presence ; for that she signed it in her bed-chamber, and they subscribed it in the hall, and that it was *not* possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, and that the testatrix continued in her chamber all the time the witnesses were subscribing : the court were of opinion that, as to the devise of lands, the latter will was void for this defect.

So, where one devised lands to J. S. and his heirs, and duly subscribed his will in the presence of three witnesses, but the witnesses, for the ease of the testator, went down stairs into another room, which was out of the presence of the testator, and attested the will there ; it was contended, on the part of the devisee, that the will, as to the devisor, was executed, and that the form of the witnesses subscribing in the presence of the testator was only prescribed by the statute of frauds to prevent a rash disinherison of the heir ; but that, since the executing of the will was fully proved,

Ecclestan v.
Petty al. Speke
Carrth 79.
S. C. Comb.
156.
S. C. 1 Show.
89.
Ca. T. Holt.
222.

Broderick v.
Broderick,
1 P. Will. 239.

proved, though the circumstance required by the statute had not been observed, yet it was the plain intention of the testator, that the devisee should have the estate; and the devisee having the legal estate, it would be hard to take it from him in equity, and by that means to dispose of the estate from the devisee against the intent of the testator for want of a ceremony, when the end of that ceremony was answered by its being made to appear, undoubtedly, that the testator did sign and seal this will: but the court held that the will was not duly executed.

And, though the retiring of the witnesses be by desire of the devisor, that will make no difference, the devise will nevertheless be void if the testator could not see them subscribe it: and so it was held by the court, on a trial at bar in the case of *Machell* and Sir *William Temple*. In this case there was a deed of settlement, with power to revoke by any deed, &c. or by last will and testament. The party made his will, and published it in the presence of three witnesses, but he being sick, and there being so great a company in the room that the noise thereof disturbed him, he desired them to go into the next room to subscribe their names, which they did. And one question was, If this were a good will within the statute, it requiring that the witnesses should

*Machell vs
Temple,
2 Show. 283.*

sign

sign it in the presence of the testator; and the court and counsel agreed upon a special verdict; but the jury found for the plaintiff, who was heir at law, saying they were all of opinion that it was not a good will.

And a devise, even if it be executed in the room where the testator is and may see it if he please, will, if the subscribing be done in a clandestine and secret manner, be void notwithstanding.

Thus, where C. a feme covert, being authorized thereto by virtue of a power reserved on her marriage, made her will, and thereby devised lands, and there were four witnesses to the will, one of whom was gone beyond sea; two swore that they saw the will executed by the testatrix, and that they subscribed the same in her presence; the third swore, that he subscribed the will as a witness *in the same room*, and at the request of the testatrix. Lord Cowper (before whom the cause was first heard) doubted as to the proof of the execution of this will, it not being proved expressly that the last witness signed it in the testator's presence, but he would declare no opinion upon the point until further application; and the matter coming on again before Lord Macclesfield, it was urged that the witness's subscribing this will *in the same room* with the testatrix

Longford v.
Eyre,
1 Will 740.

trix was the same as in her presence, and Sir George Sbeers's case was cited. But, as to this point, his lordship said, that he held that the bare subscribing the will by the witnesses in the *same room* did not necessarily imply it to be *in the testator's presence*; for it might be done in the corner of the room, in a clandestine, fraudulent way, and *then* it would not be a subscribing by the witness in the testator's presence *merely* because in the same room; but that it being sworn in this case by the witness, that he subscribed the will *at the request* of the testatrix and in the same room, this could not be fraudulent, and was therefore well enough.

Right vers.
Price,
Dougl. last ed.
^{141.}
Supra, 65.

The law, as stated by Lord Macclesfield in the last case, seems conformable to the decision of the Court of King's Bench in the before-mentioned case of *Right and Price*, in which the court held, that corporal presence merely was not sufficient unless there was likewise mental knowledge of the fact. In this case, on the last day on which the testator made an effort to sign the will but failed, the witnesses being present, the form of an attestation was written on the second sheet, and they put their names to it in the room where the testator lay, but he was in a state of insensibility. And the question was, Whether this will was duly executed for passing lands

lands according to the statute of frauds. In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, Whether the testator having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside because a formality required, according to an implied intention of the legislature, had not been complied with; that it did not appear but that the testator might, by possibility, have opened his eyes while the witnesses were subscribing their names; and *that*, according to the law as laid down in *Sbeers* and *Glasscock*, would have been sufficient. *Sed, per curiam*, the court will lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute has been complied with: this was the principle of *Sbeers* and *Glasscock's* case, and other cases of that sort. But the case *then* before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental qualities. That it was usual in precedents of wills to say, that the witnesses subscribed *at the request of the testator*, that indeed was not

expressly required by the statute, but the practice shewed the general understanding, and the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case the testator could not know whether the will that he had begun to sign was that which the witnesses attested ; he was dead to all purposes or power of conveying his property.

*Hands vers.
James,
Comyns 531.*

And, in the case of *Hands* and *James*, it was determined that the question, whether present or not, was a fact for the consideration of the jury upon all the circumstances of the case. In that case it appeared, in evidence on ejectment, that H. by will, devised lands to I. and the attestation was in these words, " signed, sealed, published, and declared by the testatrix as her last will and testament, in presence of us," and then the witnesses set their names. The witnesses being dead, there was no proof that they set their names in presence of the testatrix, but it appeared that one of them was an attorney of good character ; on these facts it was left to the jury, who found a verdict for the devisee ; but a case was reserved, by consent, for the opinion of the court, Whether it should have been left to the jury to determine, whether the witnesses set their names

in

in the presence of the testatrix? and the court held that it should; for, though the witnesses were required by the statute to subscribe their names, as such, to the will in the presence of the testator, yet it did not require that this should be taken notice of in the subscription thereto; and that, whether inserted or not, it must be proved; that, although it were inserted, it did not conclude, but the contrary might be proved; that therefore, if, that it was subscribed in the presence of the testator were not conclusive when inserted, the omission of it did not conclude that it was not so subscribed; consequently it might be proved by the best evidence the nature of the thing would admit: that in case the witnesses had been dead, there could probably have been no express proof, since, at the execution of wills, few except the devisor and witnesses were present; therefore the proof must be circumstantial. The circumstances here were, first, that three witnesses had set their names, which must be intended to have been done regularly. And, secondly, that one witness was an attorney of good character, who might be presumed to understand what ought to be done rather than the contrary. And the plaintiff was in consequence nonsuited.

This question was again agitated in the case of *Croft and Pawlett*, where the attestation was

*Croft ver.
Pawlett,
2 Strange,
1109.*

S. C. 8 Vin.
Abr. 128.
Pl. 14. et
2 E. C. Abr.
765, 12.

in these words, " signed, sealed, published, and declared, as and for his last will, in the presence of us, A. B. and C." the witnesses being dead, and their hands proved in common form, it was objected that this was not an execution according to the statute of frauds ; for, that the hands of the witnesses could only stand as to the facts they had subscribed to, *and signing in the presence of the testator was not one* ; but the court were of opinion, on the authority of the last mentioned case, that this was a matter of evidence of a compliance with all circumstances, to be left to the jury : and a verdict was given for the will.

The reader will observe, that the last case is distinguishable from that preceding, since it does not appear that either of the witnesses was an attorney of eminence ; consequently the presumption was less forcible than in the former case.

The words " three or more," come next under our consideration : upon these, two questions have been much agitated in Westminster Hall ; the one as to what is a signing by three witnesses : the other, whether the three witnesses were required to attest and subscribe at one and the same time, or might attest and subscribe at several times.

The former point was first brought before the court, upon a special verdict on ejectment, in the case of *Lea* and *Libb*, the facts of which were as follows: D. by his will in writing, devised that his lands should be sold by his executors for the payment of his debts, which will he signed and published in the presence of two witnesses, viz. W. and B. who attested and subscribed the will in the presence of the testator. About a year afterwards D. made another writing, by which he revoked a legacy given by his will, and gave a new legacy, and also thereby declared that his intent was, that his will should be ratified and confirmed in all things, except as he had altered it by that writing, and that this codicil should be accepted and taken as part of his will. This codicil was signed and published in the presence of two witnesses only, viz. B. who was a witness to the will, and H. who was a new witness. At the time of making the codicil, neither the first will, nor the last witness thereto, viz. W. was present, and the codicil was separate and never annexed to the will.

Lea v. Libb,
Carth. 35.
S. C. Ca. T.
Holt. 742.
S. C. Comb.
174.
3 Mod. 262.
1 Show. 68.

The question was, Whether, by this will, signed and attested as above, the lands were well devised within the statute of frauds,

Ibid.

Ibid.

It was argued, in support of the will, that the making this codicil was a new publication, and that it was not material whether it was affixed to the will or not; because a will was good although it was in two loose sheets of paper, for it was still but one will; that, in this case, although the codicil was not actually annexed to the will, yet both made but one will in law, and one was not intire without the other, but both together made the will; that, consequently, if the will and codicil were but one instrument, the words of the statute were literally pursued; for, then, there were three witnesses who subscribed and attested the codicil, which was part of the will, and the will itself; and, so, that the whole will, which consisted in both the writings, was attested and subscribed by three witnesses in the presence of the testator, which was all that was required by the statute.

Ibid.

But the court held that the will and the codicil together were not sufficient to pass the lands; for, that the statute of frauds expressly required three witnesses to every will by which lands were devised; that a certain method was pointed out thereby, which every person in making a will ought to pursue to prevent fraud, consequently those who would have the benefit thereof ought to adopt the means thereby prescribed.

scribed, which was not done in this case; because H. who was witness to the codicil only, could not thereby become a witness to the will: and Holt, Chief Justice, argued that, if lands had been devised by the codicil, such devise would certainly have been void, not being sufficiently attested; because one of the witnesses who subscribed the will was in no wise concerned touching the codicil, and one of the witnesses who subscribed the codicil was in no wise concerned touching the will.

So, where I. by his will, which, after his death, was found in a drawer in his closet wrote with his own hand and signed and sealed but not witnessed, devised freehold and copyhold lands to the Master and Fellows of Trinity College; afterwards, as he lay on his death-bed, he made a codicil, which was called a codicil to be annexed to his last will, and was attested by four witnesses, but his will was not then produced, but remained in his closet till found as above mentioned. One question was, Whether this will was duly executed according to the statute of frauds? and it was contended, that the codicil, taking notice of the will and being duly executed, made the will good, and had the same operation as if it had been affixed to the will at the time of the execution thereof; for the law

Atty. Gen. v.
Barnes, et al.
Pre.Chan. 270,
S. C. Gilb.
Rep. Eq. 5.
3 Rep. Ch. 151
2 Vern. 597.
Hil. 6 Anne

annexed it to and construed it as part of the will, and the laying it in another place was of no signification. On the other side, it was insisted (and of that opinion was the court) that the will not being executed according to the statute of frauds, could not be valid to pass the freehold lands, and that the taking notice thereof in the codicil would not mend it; for *that* might be executed in another room for aught that appeared, and the witnesses thereto see or know nothing of the will: And the will was decreed to be void.

The last-mentioned case is cited in *Comyn's Reports* 384, as the case of Serjeant *Maynard's* will, and there said to have been established by act of parliament; but this seems to be a mistake,

*Penphraser v.
Lord Lansdowne, cited
Comyns 384.
Hil. 11 Anne.*

Again, where *John Earl of Bath*, by his will made 11th Oct. 1684, but which was not witnessed, took notice that his lands were settled upon his sons *Charles* and *John*, in tail male; and then devised, "that in case his sons should have no issue male, then, for preservation of his name and family, he gave his lands unto his brother *Bernard Granville*, and the heirs male of his body issuing." *Bernard* died in the life of the testator. In 1701, Lord *Bath* sent

sent for seven persons, and told them, " he
 " sent for them to be witnesses to his will,"
 and sometimes " to be witnesses to the repub-
 " lication of his will ;" and then took a codicil,
 dated the 15th August 1701, in one hand and
 the will in the other, and said, " This is my
 " will, whereby I have settled my estate, and
 " I publish this codicil as part thereof :"
 and then signed the codicil (which lay upon
 the table with the will) in the presence of
 the witnesses, who subscribed in his presence.
 By this codicil he devised, in these words :
 " Whereas I heretofore made my will, dated
 " 11th October 1684, which I do not intend
 " wholly to revoke, but in regard to the many
 " accidents and alterations to my family and
 " estate, I by this codicil, which I appoint to
 " be taken as a part of my will, devise as follows,
 " &c." He then put the will and the codicil to-
 gether into a sheet of paper, and sealed them up
 in the presence of the same witnesses ; but the
 will was not unfolded in their presence, nor did
 any of them write their names as witnesses on or
 under the will, or on the same paper, but on
 the codicil only. And this was held by *Parker*
Chief Justice and the court, on a trial at bar
in ejectment, not to be a good will within the
statute of frauds.

But

trix was the same as in her presence, and Sir George Sheers's case was cited. But, as to this point, his lordship said, that he held that the bare subscribing the will by the witnesses in the *same room* did not necessarily imply it to be *in the testator's presence*; for it might be done in the corner of the room, in a clandestine, fraudulent way, and *then* it would not be a subscribing by the witness in the testator's presence *merely* because in the same room; but that it being sworn in this case by the witness, that he subscribed the will *at the request* of the testatrix and in the same room, this could not be fraudulent, and was therefore well enough.

Right vers.

Price,

Dougl. last ed.

141.

Supra, 65.

The law, as stated by Lord Macclesfield in the last case, seems conformable to the decision of the Court of King's Bench in the before-mentioned case of *Right and Price*, in which the court held, that corporal presence merely was not sufficient unless there was likewise mental knowledge of the fact. In this case, on the last day on which the testator made an effort to sign the will but failed, the witnesses being present, the form of an attestation was written on the second sheet, and they put their names to it in the room where the testator lay, but he was in a state of insensibility. And the question was, Whether this will was duly executed for passing lands

lands according to the statute of frauds. In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, Whether the testator having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside because a formality required, according to an implied intention of the legislature, had not been complied with; that it did not appear but that the testator might, by possibility, have opened his eyes while the witnesses were subscribing their names; and *that*, according to the law as laid down in *Sbeers* and *Glaſcock*, would have been sufficient. *Sed, per curiam*, the court will lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute has been complied with: this was the principle of *Sbeers* and *Glaſcock's* case, and other cases of that sort. But the case *then* before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental qualities. That it was usual in precedents of wills to say, that the witnesses subscribed *at the request of the testator*, that indeed was not

expressly required by the statute, but the practice shewed the general understanding, and the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case the testator could not know whether the will that he had begun to sign was that which the witnesses attested ; he was dead to all purposes or power of conveying his property.

*Hands vers.
James,
Comyns 531.*

And, in the case of *Hands* and *James*, it was determined that the question, whether present or not, was a fact for the consideration of the jury upon all the circumstances of the case. In that case it appeared, in evidence on ejectment, that H. by will, devised lands to I. and the attestation was in these words, " signed, sealed, published, and declared by the testatrix as her last will and testament, in presence of us," and then the witnesses set their names. The witnesses being dead, there was no proof that they set their names in presence of the testatrix, but it appeared that one of them was an attorney of good character ; on these facts it was left to the jury, who found a verdict for the devisee ; but a case was reserved, by consent, for the opinion of the court, Whether it should have been left to the jury to determine, whether the witnesses set their names

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in the presence of the testatrix? and the court held that it should; for, though the witnesses were required by the statute to subscribe their names, as such, to the will in the presence of the testator, yet it did not require that this should be taken notice of in the subscription thereto; and that, whether inserted or not, it must be proved; that, although it were inserted, it did not conclude, but the contrary might be proved; that therefore, if, that it was subscribed in the presence of the testator were not conclusive when inserted, the omission of it did not conclude that it was not so subscribed; consequently it might be proved by the best evidence the nature of the thing would admit: that in case the witnesses had been dead, there could probably have been no express proof, since, at the execution of wills, few except the devisor and witnesses were present; therefore the proof must be circumstantial. The circumstances here were, first, that three witnesses had set their names, which must be intended to have been done regularly. And, secondly, that one witness was an attorney of good character, who might be presumed to understand what ought to be done rather than the contrary. And the plaintiff was in consequence nonsuited.

This question was again agitated in the case of *Croft and Pawlett*, where the attestation was

*Croft ver.
Pawlett,
2 Strange,
1809.*

took up the sheet of paper, and holding it up, said, "It was his will;" and certainly he did not mean a part of it only, but the whole of it; and he desired them to attest it. All this must relate to the whole that was written on this paper; and it was held to be well executed.

The next question on the last-mentioned branch of the clause in discussion was, Whether the three witnesses are required to attest and subscribe at one and the same time, or might attest and subscribe at three several times?

Anoa. 2 Ch.
Ca. 109.

The first case upon this point arose in Trin. Term, 34th Car. II. in Chancery, in which it was resolved, that a will of lands, attested by three witnesses, who, at several times, subscribed their names at the request of the testator, but were not present at one time together, was a good will within the statute.

If it be objected, that this was a resolution in Chancery, but no authority in a court of law, this answer may be given; that there is the same rule of property in equity as in law, and the same construction on the statute law; and this case is the stronger, because it is a statute for

for preventing of frauds, which it is the proper business and jurisdiction of a court of equity to suppress.

So, in the case of *Cook and Parsons*, the Lord Keeper held, that a publication of a will before three witnesses, though at three several times, was good within the statute.

Cook v. Parsons, 2 Vern.
429. Pre. Chan. 184.

But this question was brought before a court of common law, in the case of *Jones and Lake*, on a special verdict upon an ejectment: The case was this, the devisor signed and executed his will in December 1735, in the presence of two witnesses, who attested the same afterwards in his presence; in the year 1739, he with his pen went over his name in the presence of a third witness, who subscribed his name in his presence and at his request; and the question was, Whether this was a due execution of the will under the statute of frauds and perjuries? *Et, per Lee* Lord Chief Justice, this case depends upon the words of the statute. The requisites in the statute are, that the three witnesses shall attest the signing; but it does not direct that the three witnesses shall all be present at the same time. His Lordship said, that there had been no determination as to this

Jones v. Lake,
Feb. 1, 1742,
cited 2 Atk.
177.

this point. That, in the case of *Cook and Parsons*, the testator's signing was held good enough, though it was not before three witnesses at the same time; and the court only doubted whether the testator's barely owning the subscription to be his before one of the witnesses was good; but there was no doubt as to the validity of the will, from the execution at different times. Here was the oath of three attesting witnesses; this was the degree of evidence required by the statute, and the same credit was given to three persons at different times as at the same time. That the court could not carry the requisites further than the statute directed; the act was silent as to this particular; it would, therefore, be making a new requisite: The signing was the same act reiterated; the testator, in the principal case, went over his name again and declared it to be his last will; and judgment was given against the heir at law.

But though the execution of a will where the testator signs in the presence of one witness and afterwards in the presence of two, or where the witnesses sign at three several times, be sufficient to pass lands by the statute; yet it is the safest way to execute the will in the presence of all three witnesses; because there may be great difficulty

difficulty in the proof where the testator signed, if the witnesses attest and subscribe separately. And, if the witness or witnesses who subscribed by themselves should die, it would be difficult to prove the will; for proof of the hand-writing could not be admitted where there were living witnesses to the will, and they could not prove the subscription of the third witness who was dead. Besides, if any of the witnesses in such case swear that the testator was not sane, or either of them deny his own hand-writing, great difficulty may incur in establishing a will so circumstanced.

The next and last word essential in the construction of this clause is the word "credible" as applied to witnesses.

Upon this word three points have been made.

First, Who are those witnesses described in the act by the word "credible."

Secondly, Whether non-credibility can be purged by any matter, *ex post facto*, so as to establish a will, the witnesses to which are not credible at the time of its execution.

Thirdly, Whether, allowing that witnesses, not credible, cannot be admitted to prove their own devises, they may nevertheless be let in to prove other devises wherein they have no interest.

Helier v. Jenyngs, Com. Rep. 91. S. C. 1 Freem. 510. 1 L. Raym. 505. Ca. B. R. T. W. 3. 276. Carth. 514.
Nota. In the last Reporter, this case is misstated in several points; particularly by stating that his credibility at signing depended upon his competency at law, without stating why the latter, viz. the competency at law was the criterion of the former, viz. the credibility at signing; namely, that no person who would be incompetent to prove a will on a trial could be credible to attest it upon the execution. And also by narrowing his conclusion to the very case before him, by

The first case that arose upon the question, who those witnesses were that are described by the word "credible," was that of *Helier* and *Jenyngs*, mentioned by most of the cotemporary Reporters, but most accurately stated by Lord *Raymond*. The facts therein material to the question now under consideration were these: T. I. seised of hereditaments in fee, made his will, and thereby devised the same to W. H. and his heirs, and signed, sealed, and published the will in the presence of three witnesses, who subscribed the same. One of the witnesses was W. H. the devisee. It was objected, that this devise was void, W. H. not being a credible witness thereto under the statute of frauds. On the part of the devisee it was contended, that the will was good notwithstanding the statute, for the devisee was a man of indisputable credit: That, though he could not be sworn upon a trial, yet it could not be said but that there were three witnesses to the will, and that the will had been well proved by the other two witnesses.

That

That there was a difference between a matter which went to the credit of a witness's testimony, and a matter which went in bar of it; that the former excluded persons from being witnesses, as if a man were attainted of treason, or convicted of perjury or forgery, or any other matter of attain'd; but that, where there was only an interest which barred him from being a witness but did not touch his credit it was otherwise. That the intent of the act was to prevent perjuries; but this could not be within the mischief of the statute; because the devisee, being a witness, could not be sworn and examined upon it; and therefore the case was out of the statute.

But it was argued on the other side, and so held by the court, that this will was not executed according to the statute of frauds; for that a man who could not be a witness, which was the plaintiff's case, could not be a credible witness: That the intent of the act was to prevent frauds as well as perjuries; which intent would be evaded if the devisee should be admitted to be a witness, for he, being a party interested, might be induced to use fraud; and it was said, that the statute appointed three witnesses, &c. to the end that the transaction might be in such a solemn and notorious manner, that they might

saying, "the
"will was
"void, quo ad
"the devise,
"and, as to the
"devise;"
from whence
it is natural to
infer, that it
might have
been good
as to any
other devise.
Whereas, if
he had stated
the general
proposition or
principle, the
reader could
not have been
misled. The
reason why
the emphasis is
laid on that de-
vise is, that, in
fact, all the rest
of the will re-
lates to person-
ality, respecting
which the
will was clear-
ly good.

see that the devisor, being infirm as well in understanding as in body, as all men generally *in extremis* were, did not suffer any imposition ; but that, if persons who could not give evidence of their subscription, should be admitted to be credible witnesses, it was to admit so many dead letters to be witnesses ; which entirely evaded the intention of the act ; and upon this point judgment was given against the devisee.

*Holdfast v.
Dowsing,
2 Strange 1253.*

It having been decided, in the above case, that persons *any way interested*, as well as persons rendered incompetent by crimes, were not within the description of credible witnesses, the next question agitated was, Whether non-credibility could be purged by any matter *ex post facto*? This point was brought before the court of King's Bench in the case of *Holdfast* on the demise of *Anstey* vers. *Dowsing*. This case arose on a special verdict on an ejectment for lands in *Cambridgeshire*; and the facts therein stated, material to the present question, were as follow : T. being seized in fee; by his will devised the lands in question to A. for life remainder, &c. then he charged all his real and personal estate with annuities and legacies ; and particularly with an annuity of £. 20 per annum to E. the wife of H. for her life, *and to her separate use* ; and also gave a legacy of £. 10 each to H. and his

his wife for mourning. To this will there were three witnesses who subscribed their names, whereof H. was one. They were all living, so likewise was the wife of H. The devisee, before and at the trial, made a tender to H. of £. 20 for his and his wife's legacy, which he refused to accept, and those legacies, at the time of the trial, were not discharged. This cause was three times argued at the bar; at length the opinion of the court was delivered by Lord Chief Justice Lee.

His Lordship said, that the right to devise depending upon powers given by statutes, they must all be considered together, as creating one general parliamentary rule; the particulars of which were, that it must be in writing, signed, and there must be an attestation of three *credible* witnesses, in the presence of the devisor. These were checks introduced to prevent men from being imposed upon, and certainly meant, *that the witnesses who were required to be CREDIBLE, should not be such as claimed a BENEFIT by the will:* That if the tender should be equal to the payment of the two money legacies (as it was not) yet the annuity charged upon the estate devised would still subsist; and, though it was charged both upon the real and personal estate, and the personal (which was not found to be sufficient) would be

Tbid.

the first fund, yet it was for H.'s advantage to enlarge the fund, by taking in the real estate; and, at law, the husband must be considered as benefiting by the annuity, though given to the wife's separate use; for it was his money the moment it was paid into her hands, or, if not, it eased him in point of maintenance.

Ibid.

It had been objected, that nothing vested until the death of the devisor, and that, therefore, *at the time* of the attestation, he had no interest. But the answer was, *that he was then under the temptation to commit a fraud*, and that was *what* the parliament intended to guard against.

Ibid.

Another way that it had been attempted to be supported was, that it might be void as to the annuity, but good as to the devise; which was grounded upon an expression in Cartbiew's Report of *Hilliard vers. Jennings*, that the will was void *quo ad* the devise of lands to the plaintiff. But that whoever read that will from the record would see, that there were no other lands devised; and therefore it was equal to saying, it was void as to any passing of lands; and that it was proper to confine the invalidity of it *to lands*, because *as to personal estate* it was certainly a good will. That a contrary construction would open

open a door to fraud. Suppose a man had four estates, and was beset by four who fraudulently procured a will whereby each had a separate estate devised to him ; if one was allowed to be a witness for the other three, they thereby would establish it for the whole. In *1 L. Raym.* 730, it was held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as *3 Mod. 263*, the party benefited in one sheet could not be set up to prove every other sheet.

That it was agreed, that this man could not be examined ; how then was he that credible witness that the statute required ?

Ibid.

The true time of his credibility was the time of attestation ; otherwise a subsequent infamy, which the testator knew nothing of, would avoid his will. That the Digest, lib. 28. tit. 1. l. 22. *De testibus, subscriptione et signis*, was express : *Conditionem testium tunc inspicere debemus cum signarent, non mortis tempora*, and so was the Code, lib. 6. tit. 23. l. 1.

Ibid.

The court therefore held, that this was not a good attestation of a will of lands.

Ibid.

1 Vez. 503

But this case was afterwards carried on appeal into the Exchequer Chamber, where there was a difference of opinion thereupon among the Judges; but, the parties compounding, it was never determined.

Price v. Loyd,
1 Vez. 503.

The question as to credibility was again agitated on a bill for establishment of a will in the case of an infant. The objection taken was, that it appeared, on examination on the interrogatories, that one of the witnesses to the will was a creditor for a bill of fees and disbursements, and had not released. It was insisted, that, on account taken, he would be found not to be a creditor. The Lord Chancellor sent it to the Master, to inquire whether he was so; then it was objected that the condition of the witness, as was determined in the case of *Anstey and Dowling*, must be taken to be at the time of attestation; and that if interested, then he could not be a good witness. It was answered, that, if that doctrine prevailed, it would overturn many wills, for servants were often made witnesses, who generally had legacies given them.

Price v. Loyd,
2 Vez. 374.

But, on the Master's special report in the above case, it appeared, that the witness to the will, at the time of the second examination, was not a creditor of the testator; and it not appearing, at the time
of

of attestation, that he was, Lord Hardwicke said he would not enter into a minute inquiry whether he was or no.

Previous to the case of *Anstey and Dowling*, it had been usual, it seems, in cases of money legacies to witnesses, to admit them upon payment or a release; a practice which appears to have sprung up from the like proceeding in the spiritual court, where a release will make a witness; but it had never prevailed so far as to admit a release or payment to restore the witness where he was a real devisee; so far from it, that the case of *Hilliard and Jennings* passed always for law without a murmur; but after the true principle of the statute of frauds came to be thoroughly discussed in the case of *Anstey and Dowling*, the practitioners took the alarm. It then became obvious that, if the court of King's Bench were right in their principle, no such practice could be introduced as to devises; but as it was apparent that the validity of many just wills would come in question, unless some remedy was administered in time, the legislature were applied to, and, by act of parliament, attempted to ease the evil, without in any degree weakening the statute of frauds.

For this purpose, in order to remove the doubts which had arisen, who were to be deemed legal witnesses within the intent of the 29 Car. II. c. 3. sect. 5. it was enacted by the 25 Geo. II. c. 6. sec. 1. "That if any person should attest the execution of any will or codicil which should be made after the 24th day of June 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts shall be thereby given, or made; such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerned such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil."

And, section 2, "That in case by any will or codicil already made, or thereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts; and

" and any creditor, whose debt is so charged, has
 " attested, or shall attest, the execution of such
 " will or codicil, every such creditor, notwithstanding
 " standing such charge, shall be admitted as a
 " witness to the execution of such will or codicil,
 " within the intent of the said act."

Sect. 3. And that " if any person hath attested
 " the execution of any will or codicil already
 " made, or shall attest the execution of any will
 " or codicil which shall be made on or before
 " the 24th of June 1752, to whom any legacy
 " or bequest was or shall be thereby given, whether
 " charged upon lands, tenements, or hereditaments,
 " or not, and such person before he
 " shall give his testimony concerning the execution
 " of any such will or codicil, shall have been
 " paid, or have accepted or released, or shall
 " have refused to accept such legacy or bequest
 " upon tender made thereof; such person shall
 " be admitted as a witness to the execution of
 " such will or codicil, within the intent of the
 " said act, notwithstanding such legacy or bequest."

But this statute was not sufficiently comprehensive in its terms, to include every possible circumstance from which bias in the mind of a witness might be presumed. Cases out of the

purview of this statute, upon principles that will hereafter be explained, soon occurred, which rendered the further discussion of this point of credibility necessary.

*Wyndham verf.
Chetwynd,
1 Burr. Rep.
41428 Geo. II.*

Accordingly, this question was again brought under consideration of the court of King's Bench on a special verdict, in the case of *Wyndham* and *Chetwynd*. In that case, W. C. being seised of lands, &c. made his will and a codicil thereto, bearing date 14th May 1750; and after devising certain parts thereof in the will, charged the residue of his real and personal estates with the payment of all his just debts, legacies, and incumbrances. The will and codicil were duly executed in the presence of, and subscribed by, S. S. R. B. and I. H.—S. S. and I. H. were attorneys at law, and had been employed by W. C. in or about the year 1747 to solicit a private act of parliament, and charged him as debtor in their books for the fees, and expences of soliciting thereof, the sum of £. 318, and the charge continued so until and after the death of W. C. Some time after which S. S. and R. B. delivered a bill for passing this act to the trustees appointed in the act for the purposes therein mentioned: there was a clause in the act for payment of the expences attending the same, and before the examination of S. S. and R. B. as

witnesses on this ejectment, there was received from the trustees the sum of £. 302. 4s. 8d. $\frac{1}{2}$ and the trustees were willing to have paid the remainder of the demand, if it had not been for a miscalculation. There was likewise a current account open and subsisting between S. S. R. B. and W. C. for other business, on the balance of which account, if stated at that time, S. S. and R. B. were indebted to W. C. £. 138. 14s. 10d. Also, at the death of W. C. there was due and owing from him to I. H. the other subscribing witness, who was his apothecary, £. 18. 5s. 5d. £. 11 whereof were due on the 25th December 1749 on simple contract; W. C. died on 17th May 1750. There were mortgages upon W. C.'s estates at the time of his signing the said will and codicil, and of his death, to the amount of £. 24,000. And at the time of his death he owed £. 1,600 upon bond, and £. 2,874 upon simple contract. His personal estate then amounted to £. 13,972, and was sufficient to pay all the simple contract and bond debts. The estates in mortgage were of sufficient value to discharge the incumbrances thereupon. The executor of W. C. paid J. H. one of the witnesses the sum of £. 18. 5s. 5d. after W. C.'s death and before his examination in the cause. Upon these facts the question was, Whether these paper writings, or either of them, were

or

or were not duly executed, so as to pass lands.

Ibid.

This depended upon two questions; first, Whether the facts, as stated, did make *these* interested witnesses, and render them not credible? Secondly, if so, Whether the subsequent circumstances did not remove the objection, and re-establish their credibility?

Ibid.

To the first it was argued for the devisee, that these witnesses were no legatees, and derived nothing from the gift or bounty of the testator; that they were justly entitled to payment of their debts, though no will had ever been made; that the personal assets were the proper fund for them to resort to, and that it was sufficient to pay their demands, therefore they were not interested in the charge on the real estate.

Ibid.

To the second, it was contended that they were competent witnesses at the time of the examination, their debts being then discharged. That the word credible in the statute 29 Car. II. c. 3, was an ambiguous expression, and capable of many senses, but there seemed to be a parliamentary exposition thereof in the statute of the 4th and 5th Ann, c. 16. sect. 14. whereby three witnesses were required to authenticate a nuncupative

pative will, and it was declared, that such as were good witnesses in trials at common law, should be deemed good witnesses to establish a nuncupative will. Now allowing the same exposition to take place on the statute of frauds, then, as these witnesses would be unexceptionable on a trial at law in respect of interest, so they would be competent; and, therefore, credible witnesses to the present devise.

On the other side, it was argued for the heir at law, that, at the time of the attestation, the witnesses were interested, and therefore incompetent; and that then, and not the time of examination, was the proper time of inspecting their credibility, else it would open greater opportunities of fraud and perjury than existed before the act; that it would be setting up witnesses to hire, and would put the validity of a will in the power of the witnesses, by releasing or not releasing their interest. That if a witness was unexceptionable at the time of attestation, and afterwards became infamous or insane, the will was nevertheless a good will, which proved that his condition at the time of attestation was alone to be regarded; that the word Credible meant something more than competent; that the law required competency before; and it was not to be imagined that the learned compiler of this statute,

Ibid.

Lord

Lord Hale, would put in a word that at best was superfluous ; that in the statute of the 13th Car. II. against deer stealing, and in all the game laws, the expression of Credible Witnesses was used, which had always been understood to mean more than competent, and to give the justices a discretion, whether they would convict upon such testimony or not, though the witnesses were, in law, strictly admissible ; and the cases of *Hiliard* and *Jennings*, and *Anstey* and *Dowling*, were cited.

After the court had taken some time to consider of it, they all agreed, that the will was *duly attested* by three credible witnesses. And Lord Mansfield delivered a very elaborate judgment, in which he took occasion to enter very fully into the discussion of the meaning of the word “credible” in the statute of frauds ; which his lordship considered as capable of being conferred on an interested witness by payment or a release.

But in a subsequent case, which I shall presently cite, it is stated, that Lord Mansfield, previous to his delivering his opinion in the last-mentioned case, declared, that it was *his own*, and he was *personally answerable* for all its errors ; the judgment of the court being *general*, that they

Lord Camb.
Arg. in Doe
v. Kersey, 14.

they held the will duly executed according to the statute.

It is material here to observe, that there is an essential difference in the wording of that clause in the statute of the 25 Geo. II. c. 6, which provides for the case of legatees; and that which provides for the case of creditors whose debts are charged upon lands or hereditaments; for in the former case, no provision having been made for persons whose interests, though arising under wills of lands, are not immediate as legatees, but only consequential, instances of that nature still remain in the same state as they were in previous to the statute of the 25 Geo. III. Because *that* being an explanatory law, it cannot be expounded by any strained construction; but must operate according to the express letter thereof, since, otherwise, if any construction could be made against the express letter of the exposition made by parliament, there would be no end of expounding. But in the latter case, a general charge, as well as a particular charge for payment of debts, seems equally within the letter and spirit of the statute; in the former case, the words of the statute are, "if any person, &c. to whom any beneficial devise, &c. (except charges on lands or hereditaments for payment of debts) is thereby given or made, &c. such devise, &c. so

"far as concerns such *person*, &c. shall be void." So that the whole of the clause refers to an immediate legatee, and not to one whose interest is not direct but consequential; but in the latter clause the words are, "In case by any will, &c. "any lands, &c. be charged with *any* debts, and "any creditor whose debt is so charged, hath "attested, &c. every such creditor shall be ad- "mitted as a witness to the execution of such "will or codicil." If this be the true construc-
Supra, 124.
tion, the last case of *Wyndham* and *Chetwynd* does not seem to want the aid of any particular arguments to support the opinion of the court, since upon the general circumstances of the case it falls within the latter provision of the 25 Geo. II. c. 6, as to creditors, witnesses, whose debts are charged on lands or heredita- ments.

This point of credibility was again agitated, in the case of *Doe* on the demise of *Kindson v. Kersey*, which came before the court of Common Pleas on a special case upon an ejectment. The circumstances material to the point now under consideration were these :

*Doe on Dem.
of Kindson
vers. Kersey.*

John Knott, by a paper-writing purporting to be his will, devised his real estates to his wife for life, and after the decease of his wife devised cer- tain

tain hereditaments, therein particularly described, to trustees and their successors for ever, upon trust to apply the rents and profits thereof to such poor people within the lordship of *Maulsmeaburn* as he therein named, viz. indigent orphans under ten years of age, unable to labor, poor aged people utterly past labor, poor impotent people lame or blind and who could not labor; and to put out the children of such poor people as above, either sons or daughters, apprentices as soon as they were fit for it. This paper writing was signed, sealed, and published by the said *John Knott*, in the presence of *Henry Holme*, *Robert Burra*, and *John Mitchell*, who subscribed the same in the presence of the devisor.

Henry Holme and *Robert Burra* were two of the trustees above named, and they, and also *John Mitchell*, the other subscribing witness, were, at the time of attesting, and long afterwards, seised in fee-simple of lands, &c. within the lordship and township of *Maulsmeaburn* aforesaid, and during the time aforesaid were possessed of and occupied the same, and inhabited within the lordship; the lordship of *Maulsmeaburn* was a large district, and maintained its own poor, and the witnesses to the will were chargeable and taxable, and were actually charged, assessed, taxed, and paid towards the

Ibid.

poor, and all other taxes of the said lordships. It appeared that *Henry Holme* and *Robert Burra* had, previous to the time of the trial, released all their interest under the said paper-writing, purporting to be the will of the said *John Knott*, to the other trustees therein named ; and also that they, and *John Mitchell* the other witness, had severally conveyed away and disposed of all their respective estates and interest lying in the within lordship and township of *Maulsmeaburn* before the trial.

Solid.

And the question was, Whether this paper-writing, purporting to be the will of *John Knott*, was sufficient to pass the hereditaments in manner above mentioned ? which depended upon the question, Whether the release and disposition of their respective estates and interests had restored the credit of the witnesses ? for, if not, it must fall to the ground, as the objection to it was not cured by the act of the 25 George II. And it was held by *Clive*, *Bathurst*, and *Gould*, against the opinion of *Pratt* Chief Justice, That a witness, incompetent at the time of attestation, might purge himself afterwards either by release or payment, and become competent by the rule of law.

further litigation, adjusted by agreement, and the parties divided the estate amongst them.

Upon these cases, which have arisen respecting this question of credibility of witnesses, the authorities stand thus: Lord Chief Justice *Lee*, and the three puisne judges of the court at that period, with Lord *Cambden*, and such of the Judges of the Court of King's Bench as differed with Lord *Mansfield* on the general point, support the doctrine, that Credibility has the same meaning as Competency, must exist at the time of attestation, and cannot be dispensed with or supplied by any *ex post facto* procedure: Lord *Mansfield*, and the Judges of the Court of King's Bench who agreed with his lordship, together with the three puisne Judges of the Court of Common Pleas, who sat with Lord *Cambden*, were of opinion, that competency, according to the rule of law at the time when the witnesses were called upon to prove their attestation, was sufficient.

But to those Judges who entertained the former opinion upon this point, we may certainly add the legislature at large, who, by the explanatory law of the 25 George II. have in all cases, to arise subsequent to the 4th of June 1752, precisely adopted that exposition; for, although the statute has said, as the case was questionable

previous thereto, wills, executed before the time limited therein, shall not be rendered invalid by reason of a mistake in construction; and that, therefore, to effectuate such wills, the common law method of supplying credit by an *ex post facto* act, as a release or payment, shall be sufficient: yet, as to all wills to be made after that time, the legislature have expressly said, that no man, not competent at the time of attestation, shall, by any subsequent act, become credible at the time of examination, by enacting, that to render all men credible at the time of examination, any act to make them incompetent at the time of attestation shall be void.

Before we leave this part of our subject, it is necessary to recal the attention of the reader once more to the case of *Doe and Kersey*, because, on the first impression, this case seems to fall within the letter of the latter provision of the statute 25 George II. for that will bore date before the 24th June 1752, and witnesses to wills made previous to that period were thereby made competent on payment, tender, or release of their legacy: but, on the construction of the act, no legatee witness appears to be within the provisions of the third clause, that provides for cases previous to the 24th June 1752, who would not be within the provision of the first clause, if the will bore date subsequent to

to that period: and, for the reason already stated, this case does not fall within the first clause, and therefore is out of the third clause.

But a legatee may be a witness against a will; for the reason why a legatee is not a witness for a will being, because he is presumed to be partial in swearing for his own interest; it follows that a legatee, when he swears against a will, swears against his interest, and so is the strongest evidence.

Oxendon v.
Penerice,
Salk. 691, 5.

And if it stand indifferent to the witnesses, whether the will, under which they are legatees and to which they are witnesses, be valid or not; the witnesses, though legatees, are credible.

Thus, where the devisee died on the 10th February 1746, having made a will, dated 15th May 1746, of his whole estate real and personal, charged with debts and legacies: the three subscribing witnesses, as being in his service at his death, had legacies; one 30*l.* a year for life, the two others pecuniary legacies; all three released the 2d February 1746. The testator had also made a former will, on the 20th of December 1744, attested by three disinterested persons, under which the three subscribing witnesses to the will of 1746 would have had the same legacies.

Lord Ailes-
bury's case,
cited 1 Burr
Rep. 427.
Cambd. Arg.
21.

A bill was brought in Chancery to have the latter will established. It was contended, that notwithstanding the will of 1744, (which the testator had revoked as he thought effectually, and might probably have cancelled) it was a benefit to the witnesses, *at the time of subscribing*, to have a legacy under the latter will. But the Lord Chancellor was clearly of opinion, that these were good witnesses; for, at the death of the testator, it was indifferent to them which will prevailed; and his lordship declared the will of the 15th May 1746 to be well proved, established it, and decreed the trust.

An infamous person is not a competent witness to a will under this statute.

Fendock v.
Mackender,
Burn's Ecc.
Law 93.
H. 28. G. 2.

Thus where the question, on a special case reserved at the assizes, was, Whether a person who before the time of attestation had been indicted, tried, and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping, was a sufficient witness within the statute? the whole Court of Common Pleas were clearly of opinion, after three arguments at the bar, that he was not a competent witness; and laid it down as a rule, that it was the crime that created the infamy and took away a man's competency, and not the punishment.

ment for it; and that it was ridiculous to say, it was the punishment that created the infamy. The court said that the pillory had been always looked upon as infamous, and to take away a man's competency as a witness; but to shew the absurdity of this notion, suppose a man was convicted on the statute against deer-stealing, there was a penalty of 30*l.* to be levied by distress, and if he had no distress he was to be put in the pillory; so that if the pillory were infamous, the person convicted (according to this notion) would be infamous if he had not 30*l.* but if he had 30*l.* he would not be so. Petit larceny was felony, and there was no case where a person convicted thereof was ever admitted to be a witness.

OF THE

D E V I S O R.

HAVING, in the preceding part of this essay, endeavoured to point out to the reader what solemnities are required, by the statutes of Henry VIII. and the statute of frauds, in the external part of a will, and which solemnities it is necessary to recollect, are equally requisite to wills made by virtue of the custom as to those made under the statutes so far as the same fall within the purview of the statutes; the next object of our attention will be the formal or orderly part which, as has been said, comprises the parties to the instrument, and the subject matter upon which it is to operate.

To every instrument of this nature, then, two things are necessary: first, that there be two parties, a devisor capable of giving, and a devisee or devisees capable of taking by it. Secondly, that there be a subject matter capable of being given by the former, and of being accepted by the latter. Of each of these, in their turn, we shall respectively treat.

Our first consideration will be, Who may be a devisor? The answer is, All persons who may convey, not disqualified either at common law or by the express words of the statutes of wills, may likewise be devisors.

Before we consider the nature and extent of the several disqualifications, by common law or by the statutes, to devise, it will be necessary to observe, that the words "*all persons*" here used, are meant to include natural persons as distinguished from civil persons or bodies politic; for, persons dead in law cannot devise, viz. abbots, priors, &c. 1 Roll 608. l. 16.

Nor can bodies politic aggregate, in their politic capacity, devise the lands or goods of their corporation. 3 Com. Dig. 14 H. 4.

And the law is the same as to sole corporations, such as masters or wardens of hospitals; they cannot devise the lands or goods of their houses. 1 Roll 608. l. 20.

As to natural persons, some of the disqualifications to devise take their rise from the common, some from the statute law, and some are referable to both. They relate either to the person of the devisor or to his estate. They may be

be divided into positive and negative, natural and civil, real and personal disqualifications.

34, 35 H. VIII.
c. 5. sec. 14.

There are four positive personal disqualifications to devise either by the custom or under the statutes; namely, coverture, being under the age of twenty-one, idiocy, and non-sane memory.

The 32 Henry VIII. c. 1. which, for the sake of distinction, I shall call the first statute of wills, makes no provision as to this point, but enacts, "that all and every person and per-
 " sons *having*, &c. shall have power to give, dis-
 " pose, will and devise," leaving it to construction to determine who shall be included in the description of "all and every person and persons." But, upon the construction of statutes, the mere letter is not to be considered, but the internal meaning and sense of the legislature therein, for often-times cases within the letter of a statute are not within the sense thereof, the sense being sometimes more confined and contracted than the letter, and sometimes more large and extensive. This extending, or diminishing the operation of the words of a statute is called, in law, construing it according to the equity of the statute, which equity implies the enlarging or diminishing the letter according to legal discretion, so as to embrace all the purposes to attain which the statute was enacted. And, therefore, where the letter

letter of the statute of the 32d of Henry VIII. empowers " all and every person, &c. to will " and devise," the equity of the law corrects these general words, and restrains them to comprehend only such persons, as by the rules of the common or statute law could, previous thereto, alienate lands by other kinds of conveyances; and, as before the statute of uses, no person, unless under particular local customs, was suffered to pass the use by will, who could not by legal conveyance pass the land itself, so, after the statute of wills, no person was held to be impowered thereby to pass land by will to take effect after his death, who could not pass the lands by other conveyance during his life. Then, although the 32d Henry VIII. gave power to every person having land to devise it, and made no exception, nor created any particular qualification, yet the law operated on those general words, and restrained them ; saying, no person disabled by the common law to dispose of their property by other conveyance should devise it; therefore, in expounding that statute, a woman covert, person under twenty-one, idiot, or person of non-sane memory, was considered as not comprehended under these general words.

Dyer 354, 16
§ Vey. 300,

But, by the explanatory statute of 34. Henry VIII. c. 5. sec. 14. it is enacted, in order to remove

move all scruples on this head, " that wills or
 " testaments made of any manors, lands, tene-
 " ments, or hereditaments, by any woman covert,
 " or person within the age of twenty-one years,
 " idiot, or by any person of non-sane memo-
 " ry, shall not be taken to be good or effectual
 " in law."

Of these four disqualifications to which the custom of devising was generally subject, and which the statute of the 34th Henry VIII. recognizes and expressly adopts, one is a *presumed* natural and positive disqualification for want of judgment or discretion in the person devising; namely, being under the age of twenty-one. Two are natural and positive disqualifications for want of will, or a disposing mind in the devisor; namely, idiocy and non-sane memory; and one is a civil positive disqualification, for want of power or free agency, namely, covverture.

The disqualification arising from being under the age of twenty-one, is founded on a presumed want of discretion in persons in the early stage of life to dispose of their property; the law; therefore, in compassion to the weakness of their judgment, has utterly disabled them from conveying and transferring their inheritance or freehold, until the judgment has arrived at maturity: and,

as

as the law cannot weigh with precision the particular ability and judgment of each individual, and it would be inconvenient and dangerous to intrust any court to determine upon personal discretion at different ages, as different persons might entertain a variety of opinions of an infant's ability and judgment, it has wisely laid it down, as a fact to be presumed and not to be denied, that all men under the age of twenty-one shall, in common, lie under this imputation of want of discretion; and, therefore, in the execution of all instruments the right to convey real property, whether it originates by common law, general custom, or statute, implies, *prima facie*, that the persons conveying are of full age, and, unless they are so, the instrument will not be valid.

But, if there be a local custom, that all lands and tenements within such a precinct &c. shall be devisable by all manner of persons who shall be of the age of fifteen years; or above such age, a devise made of lands or tenements by one of such age is good.

Perk 221. M. 37
H. 6. 5.

And it should seem that, in pleading a will by an infant, a certain age must be set down, that the court may judge it an age of discretion; and it must not be left upon telling twelve pence, or measuring

Hob. 225. Rob.
Gavelk. 224.
39 E. 3. 2 b.
13 E. 3 Fuz.
Dum. fuit inf.
ætat. 3.
19 E. 2. Godb.
14.

measuring a yard of cloth; for, custom cannot abrogate the law of nature.

Robinson Ga.
volk. 225.
39 E. 3. 2 b.

The custom of making a will by an infant at fifteen, being against common right, cannot be alledged in a town, unless it be laid, that the tenements are within some certain fee or borough, &c. and not that they are in a certain vill.

Herbert v.
Torbay,
1 Sid. 142.
S.C.Raym.84.

And in reckoning the age of an infant, the day of his birth shall be reckoned exclusive: Thus, if he were born the 15th of February 1608, this month twenty-one years after he will be of full age the 14th of February.

And, to prove non-age, an almanack was produced in which the father of the devisor had writ his nativity; and it was allowed to be strong evidence.

Dyer 143. b.
203 b. m. 75.

Flet. L. 1. c. 11.
f. 10.

Dyer 302.

The disqualification of idiocy is founded on the actual incapacity of the person, and is a common law disability. An idiot, or natural fool, is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any: for which reason the custody of him and of his lands was formerly vested in the lord of the fee; and still, by special custom in some manors, the lord shall have

have the managing of idiot and lunatic copy-holders; but the 17th Edward II. c. 9. directs (in affirmance of the common law) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and, after the death of such idiots, he shall render the estate to the heirs, in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.

4 Rep. 126.

A man is not an idiot, if he hath any glim-
mering of reason, so that he can tell his parents,
his age, or number twenty pence, or the like
common matters. A man who is born deaf,
dumb, and blind, is looked upon by the law as
in the same state with an idiot, he being supposed
incapable of any understanding, as wanting those
senses which furnish the human mind with
ideas.

F. N. B. 233.

Co. Litt. 42.
Fleta. 1. 6.
c. 40.

And by the old common law there are writs
to enquire whether a man be an idiot or not,
which must be tried by a jury of twelve men.

F. N. B. 232.

The third natural disqualification is that of
being of non-sane memory, and is likewise founded
on the actual incapacity of the person devising
to do any act relating to the disposition of his
L property,

Cro. Ja. 497.
Dyer 148 b.

property, and consequently is a common law disability. It is therefore necessary that every one must be of good and fane memory at the time of disposing of his property.

Marquis of
Winchester's
case, 6 Co. 23.
Dyer 72, a in
margin per
Coke.

1 Ch. Rep. 13,
Combe's case,
Moore 760.

And it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory which the law calls a fane and perfect memory.

6 Co. 23 b.

And what shall be said to be a fane and perfect memory at the time of devising of land, is a question to be determined at common law.

4 Co. 61 b.
Hob. 225.
Co. Litt. 112,
b.

Dyer 354, 34
Swinb. 88.

The fourth disqualification, expressly enacted by the statute of 34 Hen. VIII. is coverture, which, as has been said, is a civil disqualification at common law, arising from want of power, or free agency; for the law, having put a wife under the obedience of her husband and submitted her will to his, presumes, (and admits no evidence to the contrary) all acts, done by her during coverture, done by the constraint of her husband, and to be his acts and not hers; and, consequently, infers that she wants free will as the others want judgment.

And

And therefore it is holden; that a feme covert cannot devise to her husband; for that would be the act of the husband to convey the land to himself.

So, in 29 E. 3², where a woman, seised of lands devisable, took an husband, and had issue, and devised lands to the husband for his life and died, and a writ of waste was brought against him as tenant by the courtesy; it was holden that it did lie, and that he was not im by the devise.

³ E. 3. tit. Dev.
Bro. 43, so
cited Godb. 15.
but 4 Co. Rep.
61. cites
same case
³ E. 3. Dev. 12.
Sed vid. Br.
Dev. 34, which
is the case re-
ferred to et
S. P. Bro. Dev.
33 et 35 Ass. 3.

^aCited Godb. 15.
et vid. Fitzh.
Abr. tit. Dev.
15 Bro. tit.
Test. 13. S. C.
lib. Ass. 31,
185 a 3.

But, in *Skepwith's* case, the question was, Whether a custom for a feme covert to devise was good? The facts were as follow: it was found, upon a special verdict on an action of trespass, that the place where, &c. was copyhold land, and that the custom was, that *quælibet fæmina viro co-operta* might devise lands whereof she was seised in fee according to the custom of the manor to her husband, and surrender it in the presence of the Reeve and six other persons; that J. S. was seised of the land where, &c. and had issue two daughters and died, and that they married husbands; that one of them devised her part to her husband by will in writing in the presence of the Reeve and six other persons, and that, after-

Godb. 14 Pl.
22. ibid 143,
Pl. 178.

Godb. 143, Pl.
178.

Sed vid. 3 Com.
Dig. 14. tit.
Dev. H. 3, et
note said
there, that
femes covert
may devise by
custom of
London, but it
seems to apply
to chattels
only.

wards, at another day, she surrendered to her husband, and he was admitted, and she died, and her husband continued the possession. And the husband of the other daughter brought an action of trespass. It was contended, that the custom was good, and 12 E. 3, was cited to shew, that in York there was such a custom, that the husband might give the land of his own purchase to his wife during the coverture; and it was said that in 29 E. 3, it was held a good custom that an infant at the age of fifteen years might make a feofment, and that the same was good at common law; and yet the same all began by custom. But the court were of opinion, that the custom was unreasonable, because it could not have a lawful commencement; for it should be intended that the wife, being *sub potestate viri*, did it by the coercion of her husband. That the same law was of a custom, that the wife might lease to her husband. Then it was urged, that the custom might be good, because the wife was to be examined by the steward of the court, as the manner was upon a fine to be examined by a judge. But to this the court said nothing.

Countess of
Portland v.
Prodger,
2 Vern. 104.

But, if the husband be banished for his life by act of parliament, the wife may make a will. Thus, where the question was touching the validity

lidity of the will of *Lady Sandys*, whose husband was, by act of parliament, banished during life, and who had thereby bequeathed several legacies : The court were of opinion, that the husband being by act of parliament banished for life, the wife might in all things act as a *feme sole*, and as if her husband had been dead, and that the necessity of the case required that she should have such power, and decreed accordingly.

And of late years, since the authority of courts of equity has been fully established, and the doctrines of powers and trusts extended to answer those purposes of family arrangement, which could not be obtained whilst the strictness of common law conveyances prevailed, modes have been adopted by which *femes covert* may, by agreement, retain or procure in that situation the same powers over their own estates, real as well as personal, as they possess whilst *sole*.

If such agreement be made before marriage, it may be done without a fine or recovery ; if after marriage, there must be a fine levied, or recovery suffered ; because the property of a *feme covert*, pending the *coverture*, cannot be affected by any act of herself or her husband, unless through the medium of those species of common assurance.

2 Vez. 191.

There are two modes of settlement, equally apt for this purpose; viz. either by way of trust, or by way of power over an use. First, by way of trust, as if a woman having a real estate before marriage, either before or after marriage, by a proper conveyance (if after marriage, it must be by fine or recovery) convey the same to trustees in trust for herself during her coverture for her separate use, and, afterwards, that it shall be in trust for such person as she shall, by any writing under her hand and seal, or in nature of a will, appoint, and, in default of appointment, for her heirs; and then marry, and make such appointment as that above described: that will be a good declaration of the trust, and a court of equity will support it; and no conveyance can be made to the heir at law contrary to this direction to the trustees. In the second instance, by way of power over an use, which is the most usual mode of making such settlement. As if a woman convey an estate to the use of herself for life, remainder to the use of such persons as she by any writing, &c. shall appoint, and in default of appointment to her own right heirs; the execution of such power reserved to her will be supported in Chancery.

Rich v. Beau-
mont, et al. cit.
ed 2 Vez. 64.
in Dom. Proc.

Thus, where in contemplation of a marriage to be had, and which afterwards was had, between G. and

G. and R. the real estates of G. part whereof were in possession, and other part whereof were in reversion, were settled, by release dated Oct. 1722, and recovery, in trustees, among other uses, to the use and intent that if G. should leave issue either a son or sons, or daughter or daughters, or both, that should survive her, or that the issue of such son or sons, daughter or daughters, should survive her; then the trustees, and the survivor of them, his heirs and assigns, should, upon request and at the direction of the said G. testified under her hand and seal, by any deed in writing, or by her last will and testament in writing, or any instrument purporting to be her last will, signed in the presence of three or more credible witnesses, grant and convey the same, subject as to part to other uses therein provided, to and among such child or children as she should leave, or to the issue of such child or children, if they should die before the mother, to and for such estate and uses, and in such manner and proportion, as by such writing, will, or instrument, should be directed and appointed; and, for want of such direction and appointment, should grant and convey, &c.; and, upon further trust, that in case G. should leave no issue of her body, and that E. C. her mother should survive her, then the trustees, and the survivor of them, his heirs and assigns, should, upon request and at the charge

11 Feb. 1726.
3 Brown's Ca.
Parl. 308. Viner
vol. 4. p. 168.
Ca. 26. vol. 22.
p. 277. Ca. 47.
2 Eq. Ca. Abr.
157. Ca. 4. 753,
Ca. 2. 3 Attk.
707.

of E. C. grant and convey them to her and her heirs. And, upon further trust, that in case E. C. should not survive G. then the trustees, &c. should, upon request and at the charge of G. grant and convey the same to her and her heirs, or to such other use or uses, person or persons, and for such estate and estates as she should, by any instrument in writing under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing duly executed, or other instrument purporting to be her last will and testament, direct and appoint; and for want of such direction and appointment, &c.

Ibid.

And in this indenture of release was contained a proviso, that in case the said G. should survive the said E. C. her mother, it should and might be lawful to and for her, by deed indented under her hand and seal, executed in the presence of three or more credible witnesses, or by her last will and testament in writing duly executed, to revoke, alter, change, determine, and make void, all or any of the use or uses, estate or estates therein before limited, declared or appointed, of or concerning the said hereditaments; and by the same, or any other deed or will, to create or raise, limit or appoint, any other new use, estate or estates, of and concerning the same, or any part thereof.

The

The marriage was soon afterwards had, and nisi
 E. C. died, in January 1722, in the life-time of
 her daughter G.

G. had issue only one son, named E.—G. with nisi
 intention to advance her husband and his family,
 as she frequently declared, by virtue and in pur-
 suance of the powers reserved to and vested in
 her by the settlement above mentioned, but with-
 out having any opportunity of seeing the same,
 did, on the 29th September 1724, make, sign,
 and seal her last will and testament, attested by
 three credible witnesses ; and thereby gave and
 devised to her said son E. all her real estates in the
 county of Derby, in manner therein mentioned ;
 and, if her son should happen to die in his mi-
 nority, not having any lawful issue at the time of
 his decease, then she devised all her said real
 estate to her husband, his heirs and assigns for
 ever : And she thereby gave all her goods, chat-
 tels, and personal estate whatsoever, and also her
 lead mines and mineral duties to her husband,
 and made him sole executor.

On the very same day the testatrix died, and, nisi
 in the February following, E. her son also died
 an infant, and without issue,

On

225a

On a bill exhibited in Chancery by the husband against the heirs of the wife and trustees of the settlement to have the benefit of this devise, Lord Chancellor King, on hearing the cause, dismissed the bill as against the trustees with costs, and as to the heirs at law without costs; his lordship declaring, that if the husband had any title to the estates in question, his remedy was proper at law but not in equity.

225b.

Afterwards the husband appealed to the House of Lords from this decree, and, on his behalf, it was argued, that in case his wife happened to survive E. C. her mother, then the trustees of the settlement were, upon her request and at her option, either to convey the hereditaments to herself and her heirs in her life-time, or to such other person or persons, and for such estate and estates as she should, by any instrument in writing, or by her last will in writing duly executed, or other instrument purporting to be her last will and testament, direct and appoint. That, by the intent of the general proviso in the close of the settlement, an absolute power was also reserved to G. the wife, on the death of her mother, to revoke and alter the former trusts, and to substitute new ones in their place by her last will and testament duly executed, and to declare for whose benefit such new trusts should ensue. That she having

having survived her mother, which was the only contingency expressed in either of the said clauses, and having by her will or an instrument purporting to be her will, duly executed subsequent to her mother's death, limited and appointed the hereditaments, and the equitable estate therein to her husband and his heirs upon the contingency therein mentioned, and which had since happened; the husband ought to enjoy the benefit of such appointment, and was entitled to have a legal estate from the trustees accordingly. That the appellant's wife, by her said will or instrument, directed the trustees to convey their trust estate to such uses, and for such persons as were named therein; whereby she expressly declared her intention to be, that the legal estate should remain in the trustees, and directed it to be conveyed by them to such *cestui que* trusts as she had nominated by her will; and the only proper remedy to obtain such conveyance was in a court of equity. But if this will or instrument should be construed to enure as a revocation of the legal estate out of the trustees, rather than as a declaration of the trusts of the estate; the same, by such construction, would be made to enure contrary to the express words thereof, and contrary to the manifest intention of the party therein declared. That the settlement plainly appeared to have been executed by G, with a view and intention

tention of putting the disposition of her estates in her own power, so that she might thereby have an opportunity of advancing her husband and his family. That her constant declarations to this purpose, and the solemn execution of her will with this view, fully explained and confirmed it to have been her intention. And that this being the case of a will, a trust, and a power arising upon a trust, all which had usually received in equity a liberal sense and construction, the same ought here to be taken liberally, in favour of their intended operation; and no construction ought to be admitted, which would manifestly overturn and disappoint the declared intention of the party.

M.W.

On the part of the heirs it was contended, that there were two distinct cases provided for by the settlement; the first, if G. should die leaving any child or children who should die in her lifetime; in which event, her power of appointing was confined wholly to such child or children as she should leave, or to the issue of such as should die before her, and the limitation in default of an appointment was, in like manner, confined to her child or children, or to their issue. The next case provided for was that of G.'s dying without issue surviving her, which was subdivided on the different contingencies of the mother's surviving

viving her, or of her surviving her mother; and to this the power of revocation was immediately subjoined. Now G. having left a son who survived her, it was apprehended that neither branch of this division, or the power of revocation ever did or was intended to take place. But if the power existed it was not well executed; for when a power is reserved to revoke by a last will, duly executed, it must mean a legal will, one that is to be made under those circumstances, and with such qualifications as the law requires; but a feme covert's will of lands is by law absolutely void. That there was no necessity of understanding the will mentioned in the power in any sense different from the legal one, so as to mean any declaration of her last will and intent, though during coverture; because she was unmarried at the time of creating the power, and might then have executed it according to law; her marriage was a suspension only of the power during coverture, and upon surviving her husband, if that contingency had happened, she might again have executed it. If the will was a good revocation, the uses limited to the trustees were revoked, and consequently their legal estate was taken away and vested in the husband, and then there was no foundation for his applying to a court of equity to have a conveyance from the trustees. But whether the revocation in point
of

of law was good or not, was a question merely at law, where the husband might have the full benefit of his right, if he had any; and if there was any legal defect in the execution of the power, a court of equity would never make it good in favour of a volunteer against a disinherited heir. And therefore it was hoped that Lord Chancellor King's order of dismission would be affirmed.

Ibid.

In 3 Atk. P.
507, Lord
Hardwicke
observed, that
this was the
only instance
of a case made
by the direc-
tion of the
House of Lords
for the opinion
of the Judges.

But their lordships ordered and adjudged, that the decree of dismission should be reversed. And further ordered, that the Court of Chancery should direct a case to be stated between the parties, and to be sent to the judges of the Court of King's Bench, for their opinion on the following points, viz. Whether this will or instrument, purporting to be the will of G. was a good appointment of the estates therein contained; and whether the trusts therein limited were uses ex-ecuted or trusts?

Mr. Brown, in his compilation of cases in the House of Lords, observes that, after this case was directed, no steps were taken on either side to have it argued: as, after a very laborious search, he had not been able to discover a single trace of any further proceedings in the cause, except an order of the Court of Chancery directing the case

case to be settled by the Master in case the parties differed in stating it.

I thought it necessary to state the last case at length, and to mention the event attending it, not only because it appears to be the first case in which the validity of an appointment, in the nature of a will, by a feme covert came in question ; but also, because this case is frequently cited as an instance in which this point was determined.

Vid 2 Vez. 64.
3 Aik. 707.

And, in the case of *Southby* and *Stonehouse*, Lord *Hardwicke* was clearly of opinion, that such writing, in nature of a will, made by a feme covert by virtue of a power reserved to her in two deeds of settlement, was good. In that case the daughter of Sir *Nicholas Crisp*, being entitled to a very considerable fortune both real and personal, the former of which only was in question in the case, intermarried with S. the defendant. Articles were made before the marriage ; but what they were did not appear. Afterwards a settlement was made of her estate by two deeds ; the first in July 1740, which comprised her estate in Wiltshire ; the second in May 1748, comprising her estate in Oxfordshire.

Southby verf.
Stonehouse,
2 Vez. 612.

The first was to trustees and their heirs during the lives of husband and wife to preserve con-

tin.

tingent remainders; and the trust of that estate was declared to be to the separate use of the wife for her life, and, after her decease, the trustees were directed to pay the husband the profits for his life, or so much as she should direct and appoint; and, after the decease of the survivor of them, it was declared to be to the use of such child or children of them for such estate and estates, and in such shares and proportions, manner and form, with such limitations and conditions, as the wife should limit and appoint by act in her life, or by will, or writing in nature of a will; in default of appointment, then to the children in manner therein limited, and, in default of issue, to such person or persons as she should appoint; in default of appointment and of issue, to the defendant the husband for life, remainder to her own right heirs.

By the second deed relating to the Oxford estate, a term was created to raise money, remainder to trustees during the joint lives of husband and wife for her separate use, and, afterwards to the husband, and, after the decease of the survivor, as she should appoint, in default of appointment to the husband for life, reversion to the right heirs of the wife.

In execution of these powers the wife, in 1751, made a will, taking notice that she had, notwithstanding

withstanding her coverture, by her marriage-settlement, power to dispose of her fortune as she should think fit, and desiring her executors to dispose in manner following, with this clause :
 " Item, I leave and bequeath unto my dear husband all the profits and revenues of my estates at B—— in Wiltshire, as also all the profits and revenues of my estates at C—— in Oxfordshire, both for his natural life, subject to the payment of annuities ; and, after the death of my dear husband, I give and bequeath my said estates to my dear children, if I should leave any to survive me ; but in case I should leave no such child or children, nor the issue of such child or children, and after the decease of my dear husband, then I give and bequeath my said estates to my worthy friend J. H. making him thereby sole heir of this my last will and testament, in default of issue left by me, and after the death of my dear husband."

At the time of making the will she was with child, and was brought to bed of a daughter, and died not very long afterward. The daughter survived her mother, but died without issue, and, at the time of her death, left the plaintiff heir at law on the part of her mother, who brought this bill, claiming to be entitled to the reversion in fee of the estates in question, to have care taken

Ibid.

M . of

of the deeds and writings concerning the title to the estate, and to restrain the tenant for life from committing waste: she left also an uncle her heir at law on the part of her father. J. H. claimed the remainder in the will of her mother.

Ibid.

The question arose upon the construction of this instrument, and Lord *Hardwicke*, in delivering his opinion, laid it down as the principle by which he governed himself in his determination, that this was not a *proper will*, but a writing in nature of a will by a feme covert, by virtue of a power reserved to her in the deeds of settlement.

These appointments through the medium of powers being mere modifications of uses, did originally fall under the jurisdiction of courts of equity only; for before the statutes relating to uses, courts of law could neither judge of the consideration upon which uses arose, nor of any conveyance to uses. But the several statutes respecting uses, and, particularly that of the 27th Henry VIII. have, by transferring uses into possession, incorporated the estate and the use together; in consequence of which, uses, and consequently powers, which are modifications of them, are become legal estates, and may be judged of in courts of law.

When

When these powers were first brought under the jurisdiction of the common law by the Statute 27 Henry VIII. they were taken too strictly in point of circumstances, and being considered as in some degree analogous to authorities over the legal estate, the formation and execution of them were in consequence rigidly investigated. But of late the courts of law have considered them in a more favourable light than heretofore, and viewed them more properly as part of the old dominion which the owner of the estate reserves to himself upon the creation of the estate for life, or other estate to which they are annexed; which construction seems most consonant to natural reason and the intention of the parties. The courts, therefore, now so modify them as to indulge persons in any reasonable limitations or dispositions of their own property, so long as those limitations have not for their object the tying it up for a longer period of time than the policy of the common law permits.

Now it is observable that every power, when executed, takes its effect, by virtue of that execution of the power, as if the limitation in the instrument of appointment had been contained in the deed creating the power; for, it takes effect out of the estate of the author of the power at the time of the creation of the power; and, con-

sequently, if the author of the power has an estate, at the time of creating the power, out of which he can then carve such an estate, as the power has for its object the creation of, that estate will spring up when it is executed; as the power will then operate, *as to its effect*, on the estate out of which the limitation is to arise, as if it had been limited when the power was created.

Now if the creator of a power, at the time of making the settlement in which it originated, were a feme sole, there can be no doubt but that she might then exercise any act of ownership upon that property, or make any contract relating to it; she might dispose of it to whom or in what manner she pleased; why, then, when a feme sole, contracting as to the disposition of her property, instead of immediately limiting it to a particular person, limits to a person or persons to be afterwards appointed, the disposition of the property is considered as taking place then, though the nomination of the appointee of it is not made until the execution of the power by the actual appointment; so that the deed of settlement, and not the deed of appointment, is considered, in equity, as the deed of alienation: and when a feme sole contracts, that the person to take by her settlement made *in presenti* shall be nominated

nated by a deed in writing, or by a will, or other instrument in nature of a will, &c. to be executed in *futuro*, the latter instrument does not take effect in equity as a deed or instrument of alienation made by her under the character of a *feme sole*, but merely as an appointment of the person to take pursuant to the mode prescribed in the original contract.

And that this is the true construction of these instruments, executing powers, seems evident from this circumstance, that a settlement made before marriage of a woman's real property upon herself as if she were a *feme sole*, will not enable her to do any act for the alienation of it without a fine. A resolution before the counsel to this effect was cited in the case of *Peacock and Monk*, where the real estate of a wife was, by settlement before marriage, secured to her separate use and as if she was a *feme sole*, but no power was given her to devise it. And it was contended that, as to the trust of this estate, she was to be considered in a court of equity as a *feme sole*; and it was compared to personal estate the separate property of the wife, to which property it was incident, that she might make a will or appointment of it. But on the other side it was said that, as to land, there was a difference, for, that the husband could not give her power to make a will of

2 Vez. 192.

lands; for that the heir at law was concerned in not being disinherited, but in such a way as that she should be secretly examined. And of this opinion was Lord C. J. Willes, who said he had consulted the other Judges about it; and the will was held to be void.

s Vez. 191.

So if the disposition of the property of a feme sole be, on her marriage, left to rest on an agreement, by which she, in consideration of that marriage, agrees with her husband that she may, by writing under her hand executed in presence of witnesses, or by will, dispose of her real estate, without any thing being done to alter the nature of the estate; such agreement will not enable her to dispose thereof: for although, as to personal estate, there is no doubt but that, when there is an agreement between husband and wife, before marriage, that the wife shall have to her separate use either the whole or particular parts thereof, she may dispose of it by act in her life, or by will, and that though nothing be said of the manner of disposing of it; the reason of which is, because that is an agreement to take effect during the life of the husband; for, if the husband survives, he is entitled to the whole, and none can come in on the statute of distributions for a share of her personal property with the husband. Then such an agreement binds and bars the husband, and, consequently,

consequently, bars every body; yet the case is different as to real estate, for the real estate of the wife will descend to her heir at law, and that more or less beneficially: for the husband may, if they have issue, be tenant by the curtesy otherwise not; but in all events it will descend to her heir at law. Such stipulation then resting in agreement, if made, though it may bind her husband from being tenant by the curtesy, which arises from his own agreement, cannot affect the right of a third person, the heir at law. Still she is a feme under the disability of coverture at the time of the act done, and if she attempt to make a deed or will, the instrument will be invalid; for, in such case, it must ensue as a deed or a will, neither of which the law will permit her to make.

But it may be questionable, whether such an agreement between husband and wife would not give her a right to come into a court of equity, after the marriage, to compel her husband to carry it into execution, and to join with her in a fine to settle the estate either on such trusts, or to such uses, as would give effect to the agreement. And if it were such an agreement as a court of equity would decree to be carried into execution by a further conveyance, then the

question would be, Whether her heir at law would not be bound by the consequences of that agreement? But that is the only way by which it could be effected. But if the agreement could not be carried into execution, though she might have power to bar her husband, (his being a voluntary claim from her) yet, as the law vests the descent in the heir, the better opinion seems to be, that such a deed or will would not affect him.

But, although an instrument in nature of a will, executed by a feme covert, under a power, by deed or will, to declare and limit her real property to such persons and for such estate therein as she shall direct, does not take effect strictly and properly as a will, taking its inception as an independent act of the mind at the time of its execution, but, as an appointment or dependent act, referring back to the settlement out of which it issues and by which it is created, and deriving from that all its operative faculty; yet in all other respects, viz. as to the external form, and its action upon the estate settled, it partakes in all respects of the nature of the instrument to which, by the terms of the settlement, it is to be analogous; therefore the same disqualifications that create a

non-

non-ability to devise in other cases extend also to this case.

Thus, where W. by his will devised, among other things, all his freehold, copyhold, and real estate, whatsoever and wheresoever, and all his leasehold estate, to trustees and their heirs, executors, administrators, and assigns, in trust to apply the residue, after paying their own charges, to the sole and proper use of his daughter M. during her life, and to be at her disposal, and not to be subject to the debts or controul of her husband ; and to permit her, by deed or writing, executed in presence of three or more witnesses, notwithstanding her coverture, to give and dispose thereof as she should think fit. M. being under the age of twenty-one, but above seventeen, living separate from her husband, made her will, and thereby, in pursuance of her power by her father's will, disposed of her real and personal estate in manner therein mentioned. And one question was, Whether this devise by M. was a good execution of the power under the will of W.—M. being then under twenty-one years of age ? And Lord *Hardwicke*, in delivering his opinion as to the general question, said, that this was a very considerable question, and never determined that he knew of. He could find no case where a power, given generally, could be executed by an infant,

Hearle v.
Greenbanke,
3 Atk. 897.
2 Vez. 298.

fant; and therefore he would make none. This was a power coupled with an interest, which was always considered different from a naked power. This execution was to operate on the estate of the infant, for she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which would remain in herself, if not disposed of, and descend to her daughter ; so that this was directly a power over her own inheritance which could not be executed by an infant.

Dyer 143 b.
Raym. 334.

The next disqualification that occurs is a civil disqualification at common law; viz. the devisor's being under restraint, duress, or menace of imprisonment. This, though not expressly provided against in the statute, seems necessarily to be implied, from the words in the statute of 34 Henry VIII. "at his free will and pleasure." And, consonant hereto, it was held by *Roll*, C. J. in a trial at bar, that if a man make his will in his sickness by the over importuning of his wife, to the end he may be quiet, this should be said to be a will made by restraint, and should not be a good will.

But there must be actual proof of some undue importunement of, or restraint upon, the devisor, or the law will not avoid a will regularly made.

Thus, where B. had made a will, and thereby given his lands to the children of his daughter in tail; and, after this, he made another will, whereby he gave one part of his estate to W. and another part thereof to a remote kinsman, and it appeared, in the depositions exhibited in the cause, that this will was obtained by great fraud and circumvention; for that W. got into the devisor's acquaintance, who was at that time very infirm, by pretences of some little offices of friendship and kindness, and got him away from his friends and relations, and, during his sickness, by false stories drew his affections from his daughter, and kept him in secret places that no friend might come at him; and that this will was made while he was so secreted and wrought upon, whereby he gave his estate away from his child to a stranger. All these facts were apparent before the court on the hearing of the cause, which came on before Lord Clarendon, assisted by the Judges, who all unanimously declared, that this was a will obtained by fraud and practice; and that there was great reason, if they could, to relieve against it; but that, on search for precedents, none could be found that would come up to the case. Thereupon, for difficulty, there was advice taken about it in the House of Lords, and there, upon consideration, an order was made, by way of advice to the Lord Chancellor, that he should proceed

Roberts v.
Wynn, Rep.
Ch. 125, cited
3 Ch. Ca. 103.

proceed to do justice to either party, though no precedent could be found to govern the judgment. Afterwards, this cause came on to be re-heard, June 1666, when the Lord Chancellor, assisted by Lord Chief Justice *Bridgeman*, Lord Chief Baron *Hales*, and Mr. Justice *Raynsford*, did declare, that there could be no relief, though, as it had been said before, it was apparently a will obtained by fraud, and this to the prejudice of the heir at law who had never offended, or given any cause to disinherit her. And the bill was dismissed.

3 Ch. Ca. 103.

But the parties complaining to parliament, were relieved by an act for that purpose.

Dyer 143 b.
Anderson Rep.
182. Ca. T.
Holt, 246. Ibid.
747. 11 Mod.
157. 2 Eq. Ca.
Abr. 357.

If either of the last-mentioned disabilities, viz. infancy, non-sane memory, idiocy, coveture, or dures^s exist at the inception of a will, it will be absolutely void, although the disability be actually removed before the consummation thereof by the death of the devisor; for, a devise or will is such from the making, and, therefore, the parties must be qualified and have ability *then*.

Herbert v. Tor-
ball, 1 Sid. 162.
S.C. Raym. 84
S.C. 1 E. Ca.
Abr. 172. Pl. 4.

Thus, upon a trial at bar for lands in *Essex*, where the question was, Whether the devisor was of full age at the time of making the will? it was

was agreed by the court, that if one under the age of twenty-one made a will and devised his lands, and died after twenty-one, this would be a void devise.

So, where a man at full age declared, in the presence of several witnesses, that his will, made when he was under age, should stand ; it was held, by *Holloway* and *Allibon*, that the will was void, by reason of the infancy at the time of the first publication.

Hawe v. Burton, Comb. 84.

So, if a feme covert make her will, and thereby give lands devisable by the common law, and publish her will, and afterwards her husband die, and after that she die, the devise will be void ; because the consummation is founded on the first parts, viz. the making and publishing, which are void ; and therefore, although, at the time of her death, she is discovered, yet her death cannot give effect to the will unless the commencement be good.

Plowd. 343.
S. C. 1 Eq. Ca.
Abr. 171. Pl. 3.
Salk. 238.
Rep. Temp.
Holt 240, 244,
747. 11 Mod.
123.

So, if a man be of non-sane memory at the time of making his will, though he afterwards, ever so long before his death, become a man of understanding and sound judgment and memory ; yet that will is void, and is by no means made good.

Archer v. Buckingham,
11 Mod. 157.
S.C. 2. Eq. Ca.
Abr. 357, 5.

Besides

Besides the personal disqualifications above mentioned, there are, as has been observed, certain real disqualifications which prevent persons, though possessing, at the time of the will made, all personal qualifications, from making a valid devise.

These disqualifications are two, one of which arises from the nature of the tenure; viz. the estate devised being held in joint-tenancy. The other from the devisor's not being seised of the lands, tenements, and hereditaments devised, at the time of the devise made.

I call these real disqualifications in the person devising; because the non-ability of being devised does not arise from any quality or property existing in, or absent from the thing devised, for, all lands and hereditaments are devisable by the owner of them; but it arises from the devisor's not having, at the time of the inception of the devise, a subject matter upon which it can then attach and operate. Therefore these disqualifications rest in the person of the devisor, not in the thing devised.

Litt. sec. 287.
Co. Litt. 185.
Perk. sec. 500.

And, first, as to joint-tenants, it is laid down by *Littleton*, sec. 287, and confirmed by *Lord Coke*, in *Co. Litt. 185*, a. b. speaking of devises

wives by the custom, that, if there be two joint-tenants of lands in fee-simple within a borough where lands and tenements are devisable by testament, and if one of the two joint-tenants devise that which belongs to him and die, this devise is void ; because, no devise can take effect till after the death of the devisor, and by his death all the land presently comes by law to his companion who survives by the survivorship ; for, he does not claim nor is entitled to the estate by the deceased joint-tenant, but by a title paramount. And, therefore, although his title and that of the devisee commence at one and the same instant, and although an instant (according to its common signification) is an indefinable time, and, as it is well expressed, the ending of one time and the beginning of another, yet, in consideration of law, and for the purposes of justice, there is priority of time in an instant ; and therefore, in this case, the survivor is prefered to the devisee ; for, as *Littleton* expresses it, the former claims *by* the death, the latter *after* the death ; and, therefore, although the titles commence at one instant, yet the law allows priority of time in that instant, which *Littleton* distinguishes by *per* and *post*.

And, although joint-tenants are not mentioned in the statute 32 Hen. VIII. nor expressly excepted

excepted in 34 Hen. VIII. yet they are thereby tacitly precluded from devising, not only by not being therein expressly empowered, as tenants in coparcenay and in common are, but by the power of devising being confined to persons *sote* seised.

^{1 Eq. Ca. Abr.}
^{172, &c.}

^{Vid. sec. 500.}

But some doubt was formerly entertained, whether such a devise by a joint-tenant might not be made good by events arising subsequent; for *Perkins*, after stating "that a devise by one joint-tenant of land devisable, which he holdeth in fee at his death jointly with a stranger, is not good," says, "that if such devisor doth survive all his companions, then such devise is good;" and, in support of this opinion, he cites *Littleton* in his third book, and old *Natura Brevia*. However, upon inspection of these authorities, neither of them are found to support these words, taken in the sense now alluded to: the better opinion therefore seems to be, that these references are made with allusion merely to the first position laid down in this section, viz. "that joint-tenants cannot devise." And that the latter part of the section must be taken independently of the former, and as a substantive proposition to this extent only; viz. that if such joint-tenant survive all his companions,

companions, *then* such devise, i.e. "a devise by him
"made *then*," is good.

Thus, where a joint-tenant made his will, of lands, duly attested, and devised his part of the estate, held in *jointure* with his sister, to one J. G. and then, by lease and release, made to A. B. to the use of himself in fee, severed the joint-tenancy, and died without revoking or republishing his will. The question stated, on a case reserved, was, Whether any thing passed to J. G. by the will? And it was contended, that the devisor's being sole seised at the time of his death, was sufficient to establish his will; that, where the personal ability of the testator to devise was in question, there the will must be considered at the time of making; but where the qualities of the estate or of the devisee were disputed, there the time of its operation was to be adverted to: That, as to lands devisable by custom at common law, a joint-tenant's devise was not good; because the survivorship, which was the act of law, took place of the devise. But that Perkins, sec. 500, said, that if such devisor survived all his joint companions, then such devise would be good; that, if, therefore, by long life or otherwise, the incident of survivorship was removed by any means, and the devisor became sole seised, the devise would stand: And, that,

Swift on Demi-
Neale v. Ro-
berts, 1 Blackft.
Rep. 476.
S. C. 3 Burn.
1488.

after severance of the jointure, the testator was in of the same use as before, only stript of the incident of survivorship. *Sed per curiam*, there was no difficulty in this case. The will was of an estate held by the devisor jointly with his sister. The only question was, Whether the will was not void *ab initio*. The devisor had nothing devisable. If the will of a joint-tenant could operate at all, it must be by severance of the jointure ; but that it could not do, because the doctrine of survivorship took place before the will could operate. And the court denied the doctrine laid down in *Perkins*, sec. 500, and held, That such a will would be void both at common law and upon the statute.

Ibid.

And Mr. Justice *Wilmet* said, that the time of making the will was the material time in this case, as well with regard to the quality of the estate, as to the personal ability of the testator ; for, by the express words of the 34 and 35 Hen. VIII. he must have the estate, in order to be capable of devising it. Now this man, who only held in jointure at the time when he made his will, had not a devisable estate when he made the devise ; which it was necessary that he should have had, at the time of devising, in order to make the devise good.

And

And though the joint-tenancy be avoided by an incident which has relation, as to some purposes, to the original commencement of that tenure, and operates to avoid it *ab initio*; yet, such relation will not give efficacy to a will made when, in consideration of law, the tenure was joint.

Thus where A. seised in his demesne as of fee of the manor of H. holden of the king by knights service in capite, *after the marriage* of W. his son with E. in consideration of that marriage and for the jointure of E. assured the manor of H. to the use of W. and E. in tail, and died. By the death of A. the reversion of the said manor of H. descended likewise to W.—A. was also seised of the manor of T. in his demesne as of fee, holden also of the Queen by knights service in chief, and also of certain lands in F. which lands in F. with the manor of H. were the full third part value of all the lands belonging to W.—W. by his will, devised to E. his manor of T. for her life, in satisfaction of her jointure and dower, upon condition, that if she took to any other jointure, then the devise to her should be void; and, after her decease, he devised the same over in tail male, with remainder to the right heirs of the devisor. Then W. died, leaving a son and G. a daughter. After the death of W.—E. his wife waived her estate in H.

Popham 87.
S. C. 3 Co. 31.
a. 1 And. 348.
Moore 254.

as was lawful for her to do by virtue of the statute 27 H. VIII. c. 10. the jointure thereupon being made *after* marriage. And then a question arose between G. the daughter of W. and a claimant under the will of W. whether this devise was not void under the statute of Hen. VIII. the devisor not having left a third part of the lands he held by knights service in fee to descend to his heir? The decision of this question depended upon another question, viz. Whether, by the waiver of E. the inheritance in H. of which, during the life of W. she and her husband were joint-tenants, could *then* be said to have been wholly in the husband W. *ab initio*; for, if that position could be supported, that manor together with F. being a third of the whole land, and, in consequence of the waiver, being left to descend to the heir of the devisor, the will as to the manor of T. which amounted only to two-thirds of the devisor's lands, was good for the whole thereof, and, consequently, the daughter had no claim to any part of it.

Ibid.

And as to this point, the court of King's Bench were divided, *Wray* and *Gawdy* being of opinion that the will was void, and *Clench* and *Fennor* holding the contrary. Whereupon it was adjourned into the Exchequer Chamber. And there *Periam*, Chief Baron, *Clench*, *Clark*, *Walmsley*,

ley, and Fennor were of opinion, that the devisor, by reason of the waiver, should be sole seised *ab initio*; for E. might have had dower thereof if she would, and therefore it was a sole seisin in the husband, and the descent to the heir in such a case, upon the waiver, should take away the entry of him who had right to it. And, therefore, the case for the manor of H. was within the very letter of the statute, as well for the sole seisin which was in the devisor, as for the immediate descent which was from the devisor to his heir, and therefore remained to the heir for a good third part of the inheritance of the devisor by the very letter of the statute; and that, if the letter had not helped it, yet it should have been helped by the purport and intent of the statute, which ought to be liberally and favourably construed for the benefit of the subject, who, before the statute of uses, might have disposed of his whole land through the medium of uses by his will; and the statute of 27 Hen. VIII. excluded him therefrom, and therefore, that the statutes of 32 and 34 Hen. VIII. were to be liberally expounded as to the subject for the two parts; and the rather, because it appeared by the preamble of the statute of 32 Hen. VIII. that it was made of the King's liberality, and because that, by 34 Hen. VIII. it appeared that it was made, to the intent that the subject should take the advantage and

benefit purposed by the King in the former statute ; by all which it was evident (as they said) that the said statutes should be liberally expounded for the advantage of the subject and for his benefit, and not so strictly upon the letter of the law, as had been moved.

But *Popbam* and *Anderson*, chief justices, and all the other justices and barons held the contrary, and that judgment ought to be given against the devise ; and that, by the very letter and purport of the statutes of 32 and 34 Hen. VIII. for, they said, they were to consider what estate the devisor had in the land at the time of his devise made, without regard to that which might happen by matter *ex post facto* upon the deed of another : that if it had been demanded of any apprised by the law, at the time when the will was made, what estate the devisor then had in the manor of H. none was so unlearned to say that he had any other estate in it than jointly with his wife ; and, if so, it followed that this manor was then out of the letter and intent of the law, for he was not then sole seised thereof, nor seised in coparcenary, nor in common ; and by the words of the statute he should be sole seised in fee-simple, or seised in fee-simple in coparcenary, or in common. It appeared that the intent of the statute was, that he should have full power of himself, without the means

means or aid of another, to dispose of the land of which he was by the statute to make disposition, or to leave it to his heir, and this he had not for the manor of H. And further, that the words of 32 Hen. VIII. were, that the devisor had full power at his will and pleasure to devise two parts of his land so holden; which was to be intended of such land of which he then had full power to make disposition, and this he could not then do for the manor of H. And thereupon the majority of the Judges resolved that judgment should be given against the devisee.

The second real disqualification, and which indeed partakes of the nature of the former, is the devisor's *not having or not being seised* of the lands &c. devised, at the inception of the devise, in manner as the custom or the statute requires.

The necessity of this qualification existing in a devisor, as well as almost every other incident relative to this species of conveyance, has, at one time or other, been made the subject of much litigation, as well in the cases of devises by the custom, as under the statute of wills.

Those who have maintained that this qualification was not necessary in a devisor by the custom, have cited in support of that proposition,

Sed quæ et vid.
Cont. Co. Litt.
III.

Vid. 34 H. VI.
6. a. where the
custom stated
without these
words, "tan-
"quamCatalla
"sua."

first, a case put in Fitz. Abr. 17, and likewise Bro. Abr. Dev. 15; and, secondly, some words out of the writ of *ex gravi querela*, as stated in Fitz. Nat. Brev. 460, which was a writ that, by special custom, lay where a man was seised of lands or tenements devisable by will, or by custom time out of mind, the purport of which are as follows, viz. “*Quod cum secundum consuetudinem in eadem civitate battemus obtentam et approbatam liceat unicuique civi ejusdem civitatis tementa sua in eadem civitate in testamento suo in ultima voluntate sua TANQUAM CATALLA SUA legar' cuicunque voluerit;*” upon which words of the writ it has been contended that, as goods and chattels, not in the possession of the party at the time of making the devise, might at common law be devised, so likewise, by the custom, might lands be devised, though not in the possession of the devisor at the inception of the devise.

And first, with regard to the cases stated from Fitzherbert, &c. upon this subject.

The earliest information we meet with on this point with respect to the custom, is contained in the year book M. 39 Hen. VI. f. 123, wherein a case is stated, in which a man, having devised land, was afterwards disseised, and then died without re-entry: upon which a question arose, Whether

N. B. Brook
Dev. 15. and
Fitzh. Abr.
Dev. 17, by
mistake refer
to M. Hen. VI.
Pl. 18.

ther this was a good will, the testator not having died seised? And it was held, per *Velverton et Mark*, that the devise was void, and should not be good; for, that a devise could not be good if that the devisor did not die seised; and for that reason it was held a good plea to a devise, that the devisor did not die seised of the land devised without denying or traversing the devise: And the question is then put, Whether it would be a good plea, that the devisor had *nothing* in the land *at the time of the devise*, as if he were *disseised* and then made a devise, and then re-entered? Upon this quære put in the year books, *Fitzherbert* and *Statham* have founded this position, viz. "that if "a man devise lands of which he is not seised, "and afterwards purchase the same lands and die "seised thereof, the devise is good." But there is nothing in the case alluded to, to warrant any such conclusion: for, the case of a disseisin depends upon its own particular circumstances, viz., because the disseisin turns the estate of the disseisee to a right, and that being a chose in action cannot be devised away; and therefore the book, in such case, says, "that it was held a good plea "against the devise, that the devisor did not die "seised of those lands." But no answer is there given to the latter question: However it seems, that if the disseisee did re-enter, the land would pass,

Bro. Abr.
Dev. 15.

Fitzh. Abr.
Dev. 17.
Statham, Abr.
11.

Vid. Savage's
case, cited
2 Leon. 203.

pass, and so is the opinion of Lord *Holt* in *Bunter and Cook*; for, if a man be disseised and then make a re-entry, such re-entry purges the disseisin and revests the estate, and, by relation, the disseisee, in consideration of law, is in possession again to all intents and purposes as if he had continued so from the beginning: and for that reason he may maintain an action for the mean profits between the time of the disseisin and of bringing the action, as if he had been actually in possession all the while. In such case, therefore, he may be justly said to be seised in fee of such lands, and, consequently, may dispose and devise the same away.

³⁸ H. VI. 27.
¹⁹ H. VI. 17.

Vide sup. 185.

This case, therefore, differs materially from the case put by *Fitzherbert*, in the Abridgment Dev. 17; for, in that case, the devisor would neither have *jus in re* nor *jus ad rem* at the time of making his will.

If, then, the foundation of this position in *Fitzherbert* as to devising lands of which the devisor is seised fails, we must have recourse to the other grounds upon which this proposition of *Fitzherbert* is supported; namely, the language of the writ of *ex gravi querela*, as it is before stated.

And

And here it is necessary to observe, that whatever might have been the case previous to the cultivation of feudal notions in *England*, the law, after the introduction of that policy (whether that happened before or after the time of the first William it is not necessary here to enquire) made a striking distinction between freehold property and goods and chattels, in its designation as to what should become thereof after the death of the owner; for, as to the latter, it appointed no heir on whom they descended; but the right to dispose of them, if their owner died intestate, devolved on the church. A testament therefore was, in truth, a constitution by the testator of an heir to his goods and chattels, the law having otherwise appointed none. It followed then, as this appointment of an executor was the constitution of an heir to the testator's chattels at his death, that, as well those goods and chattels which he acquired after the inception of the will, as those which he had before it, devolved upon this heir *de facto*; for, by being named executor, he stood precisely in the situation of his testator as to his chattels, and by consequence had a right to all of them, no person or persons having been appointed by designation of law to take them in his or their own right. And that seems to be the reason why, when a testament was made, all the personal estate passed to

Nota. It appears that in the times of the Saxons no words of inheritance, or shewing an intention to give lands absolutely were necessary; the insertion thereof seems likewise to be a consequence of the introduction of feuds. *Vid.* *supra* fol. 1. *Will of Leofwine:* in this sense, therefore, the words "tan- " quam bona " et Catalla" might apply.

the

Parrington
vers. Knight-
ley, 1 P. Will.
544.

a Roll's Rep.
426.

the executor, although part of the goods and chattels were disposed of by the testator specifically in the testament; for he being, in consideration of law, his, by constitution of the testator, to all the personal estate he died possessed of, on him it devolved, and he alone had a title in law to it. But the testator might, by specific bequest, after his debts paid, to which his personal estate was first liable, subject any particular part of it to any trust he pleased, which trust the courts ecclesiastical and courts of equity would enforce; but by such specific bequest nothing passed immediately to the legatee, nor could the legatee take any thing to him devised without the assent of the executor; so that such a legacy did not operate as a direct gift, at the time of the will made, but as a direction to the executor how he was to dispose of certain parts of the testamentary estate.

A testament then, in this view of it, was not considered as a gift of any specific thing to the executor, but as an appointment of an heir, and attached upon all that the testator had, as well that which was acquired after as that which was in the possession of the testator before it was made; for it was the constitution of an heir to all the testator's property of that kind, but it was subjected in his hands to the trusts of the testament.

If

If a testament contained particular bequests, and no executor was appointed, the whole property devolved on the ordinary subject to the trusts as to the particulars disposed of specifically.

Upon this principle it has been held, that the doubt started by the Court of King's Bench, in the case of *Bunker and Cook*, Whether a lease for years would pass by a will made before the purchasing thereof, is not well founded; for such lease would clearly pass thereby as part of the testator's personal estate.

1 P. Will.
3 P. Will.

Salk. 237.

But the policy of the law was different, as to freehold property; for as to that, the feudal law, when feuds became inheritable, constituted an heir in his own right, whose title had an inception, and was inchoate immediately upon the acquisition of a freehold of inheritance by his ancestor; for which reason the person who was entitled by law to an estate of inheritance next in succession, was called presumptive heir to it. This title of the heir, by constitution of law, is evident from the words necessary to be inserted in all deeds to convey the inheritance of real property, no estate of inheritance passing therein at common law, unless it be expressly conveyed to a man and his heirs; consequently, a conveyance to one and his assigns passed no inheritable estate;

estate; for though it came to be an incident to an inheritable estate at common law to be assignable by the person seised of it, yet it was assignable because it was inheritable, and not inheritable because assignable.

Then, as an estate in land purchased in fee, immediately vested in the purchaser and his heirs, it followed that though it was capable of being assigned, yet that assignment could not be effected but by an act subsequent to and distinct from the acquisition of it; because it could not be acquired but to the purchaser and his heirs: for if a man had conveyed an estate to assigns before he had acquired it, and that conveyance had been valid, two inheritable titles would have met in the same instant; namely the title of the heir to which it would have been subjected by law, and the title of the assignee to which the purchaser would have subjected it; and then that of the heir, being the elder and most favoured, would have prevailed. This principle, as to the acquisition of real estates, constitutes an incident, inseparably thereto belonging, which must make a disposition of real estate, to take effect after the death of the donor, operate in a manner different from a disposition of personal estate: for the effect of the former is to take away the possibility of succession from the heir the law has constituted; the effect of the latter

latter is to constitute an heir, the law not having constituted an heir in that case. The former therefore operates as a conveyance by the ancestor *in praesenti* to take effect *in futuro* against the title of the heir expectant ; the latter merely as the nomination of an heir to take the property the testator *dies* possessed of, which, in consequence of such constitution, devolves upon him.

This principle is likewise to be traced in the doctrine of uses ; for no man could, at common law, by conveyance to uses, convey an use in land which he was not seised of at the time of making such conveyance, any more than he could charge it or grant it. This is clear from the case of *Yelverton* and *Yelverton*. There the father covenanted to stand seised of lands, *which be afterwards should purchase*, to the use of himself for life, remainder to the use of his youngest son and his heirs ; he afterwards purchased lands and died. And the question was, Whether the eldest or youngest son should take this new purchased land ? and it was resolved that no use could arise to the youngest son, being of land that the father *bad not* at the *time* of making the conveyance. And one reason given is, that, upon every feofment or purchase the feoffor or donor from whom the land passeth, is to limit the uses and not the feoffee or donee. Then the feoffee,

before

Yelverton v. Yelverton,
Cro. Eliz. 401.

before the purchase, cannot limit the use to the youngest son when the feoffor limits it to the feoffee and his heirs.

Such conveyance or limitation then of a man's land *mortis causa* may be compared to a *donatio mortis causa*; in which latter case an actual delivery must be made, and, consequently, the donor must be in possession of the thing given; the only difference being that, in the former case, the gift is void if the donor recovers, because upon that condition and with that view it is made, being given in contemplation of present death. In the latter case no such condition is annexed, the gift being made in contemplation of death whenever it shall happen.

The true and natural sense therefore of the words in the writ of *ex gravi querela* seems to be no more than this; that as a testament might at common law have been made of goods and chattels, so likewise, by custom, a testament might have been made of houses and lands. But as to the subject matter upon which that testament of houses and lands was to attach, and its operation thereupon, that was not expressed in the writ. And it is plain from what has been stated as to the provision made by law for the disposition of these two species of property,

viz. that the one must operate as the constitution of an heir, the other as a disposition *from* an heir, that the one cannot take effect in the same manner as the other does; each, therefore, must take effect according to the nature and properties of the subject matter on which it is to operate and the time of its operation.

If then a devise of land is to be considered as an immediate conveyance or gift of the land to the devisee (and its being so is the reason why the devisee, as will be shewn hereafter, may take the lands, &c. devised without the consent of the heir or executor) this mode of construction upon the operation of it, seems consonant to the construction upon the operation of every other species of conveyance by which real property may be passed by our law. Thus, by the policy of the feudal system, the principles of which do certainly in a greater or less degree pervade our whole system of law respecting freehold property in lands or tenements, some notorious act was required to attend every direct change which happened in the proprietorship thereof, in order that those who were interested might know who was the real owner. With this view that law required, on every alienation of lands by feofment, the solemnity of livery of seisin, which might be by livery in deed, or livery in law. In both

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cases

cases the process was symbolical and necessarily imported an actual ownership in the thing aliened at the moment of alienation, because no one can deliver, unless he be first in possession of that which is to be delivered.

And, though a variety of other conveyances, by which property in land may be disposed of, have been invented, the grand objects of which are to elude and dispense with this solemnity of livery, yet it is observable, that, in every one of them, the principle upon which that ceremony is dispensed with is, that the fact, *in whom the possession rests* is notorious already, and that, therefore, no other act is necessary to make it more so ; so that these conveyances, as well as the common law conveyance of feoffment do not warrant any alienation, or disposition of lands, which the person has not, or has no right or interest in, at the time of making or executing such conveyance : And, therefore, it is said, 1 Inst. 265, that the words generally inserted in releases, as to all rights the releasor shall or can have *for the future*, are void ; for no right passes by a release but the right which the party has at the time of the release made, though it be released in express words which shew the intent of the party.

The law, indeed, in the case of a devise, dispenses with the solemnity of livery and with the interposition of those forms which were substituted in the room of it, and allows lands to pass immediately by a devise, without the ceremony of livery of seisin either in law or fact. The dispensing with these solemnities was necessarily incidental to the nature of the conveyance we are treating upon, and analogous to the indulgence it met with in many other respects: the law presumes that a devise is made *in extremis*, frequently it is done in *articulo mortis*; it would therefore have been repugnant to the very nature of the instrument to have required either the ceremony of livery of seisin, or any substitute for it, in a case where, from the nature of the occasion which required the execution of the instrument, no opportunity could be supposed to occur for carrying them into effect. Upon this occasion, therefore, the law had regard only to the state of mind of the devisor, and to the formalities that related to the instrument itself, the property in this case being considered as passing by the instrument, and not as on a feofment, by the livery of which the deed was only an evidence.

Upon these principles the courts of Queen's Bench and Common Pleas, and the House of Lords, decided the case of *Bunker and Cook*. In

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that

Bunker verf.
Cook,
1 Brown's Par.
Ca. 199. S. C.
Ca. T. Holt.

246, 749, 750.
Salk. 237.
Fitzgib. 226.
Gilb. Dev. 122.
S. C. by name
of Arthur v.
Bockenham,
ibid. 135, 2 Eq.
Ca. Abr. 295,
Ca. 1. Vin. vol.
8, p. 64, Ca. 1.
—p. 66, Ca. 11.
Rep. Temp.
Anne 130.

that case B. being commander of a ship of war, and being bound on a foreign expedition in that ship, made his will according to a form which was then generally made use of by seamen, and therein was contained a devise to his wife in these words: “ I do hereby give, devise, and bequeath “ unto my well-beloved wife F. all such sum and “ sums of money as now is or hereafter shall grow “ due to me from their Majesties for my own and “ servants service either by sea or land; as also all “ such sum and sums of money, lands, tenements, “ goods, chattels, and estates whatsoever where- “ with, *at the time of my decease*, I shall be posses- “ sed or invested, or which shall then, or of right “ doth appertain unto me, and I do hereby no- “ minate and appoint her the said F. my well- “ beloved wife, to be the whole and sole executrix “ of this my last will and testament.”

Ibid.

The testator, about nine years after the making of this will, received a sum of 2173*l.* in right of his wife; the whole of which he laid out in the purchase of an estate in Kent of the nature of gavelkind of about 200*l.* per annum, and on the 9th November 1702 he died without having re-published his will, and without any issue of his body, leaving the defendant B. his brother and heir.

On

On the death of the testator, B. entered upon these lands; but F. the widow, apprehending herself entitled thereto under her husband's will, brought an ejectment to recover the possession: And the jury having found a special verdict stating the above facts; and that, by the custom of gavelkind, any tenant, being seised of lands in fee, might devise the same by will in writing, the single question was, Whether the lands in question, being purchased after the making of the will, could by law pass by the will, there having been no republication after the purchase? And, upon arguing this question in the Queen's Bench, the court were unanimously of opinion for the defendants.

Ibid.

A writ of error was then brought by the plaintiffs, but, in the printed case on the part of the plaintiff, not a single reason is advanced why it should be reversed; it being only said, that all the Judges, when they gave judgment, declared their belief, that B. intended the lands in question should go to his wife.

Ibid.

But, on the other side, it was contended to be contrary to reason, and against the known rules of the common law of England, that a man should make any conveyance or disposition of land, which he had not at the time of making such

Ibid.

conveyance or disposition; that the custom of gavelkind enabled only persons *having* lands to make disposition thereof by will; but gave no power to persons *not having lands*, to make any disposition of such as they should *afterwards* have. That the custom being expressly found by this special verdict to be, that tenants *seised* of lands might devise them by will, therefore to support a will, on the custom, it was necessary to shew, that the devisor was seised of the lands devised, and, *being so seised*, made his will, and so was the constant course of pleading, and there was not a precedent otherwise; so that this will could not pass the lands, because the party was not seised thereof when he made it. That the unanimous opinion of the Court of Queen's Bench in the present case, upon this point, was supported by a judgment given for the defendants in the Common Pleas, by the unanimous opinion of that court upon a like special verdict, found upon the same will; and that there was not one judgment or resolution to the contrary, and upon these grounds the judgment was affirmed.

Butler v. Baker,
supra, 179.
et vid. 3 Co.
Rep. 3c, et
vid. Lovie's
Ca. 10 Rep. et
Earle's case
Nels. Lex.
Test. 480.

The same question had been long before agitated upon the statute of wills, and had received a similar decision. One of the first cases in which it occurred was that of *Butler v. Baker*, in which, as the case is stated by Lord Coke, it was resolved,

resolved, on the words of the first branch of the statute 34 Henry VIII. viz. “ all and every “ person, *having*, &c.” that the devisor, who was joint-tenant of the lands devised at the time of the devise made, had ~~not~~ power to devise the whole manor of T. by force of the said statutes: the first reason against which was founded on the word “ *having*;” for it was said, if it be asked, *quis potest legare?* the makers of the act answer, “ *every person having manors, &c.*” so that it was not said *every person generally*, but every person having &c. and this word *having* imported two things, *scil.*, ownership, and time of ownership; for he ought to have the land at the time of making his will, and the statute gave such person having &c. authority to devise in manner therein mentioned what he had, and more he could not devise, for his authority did not extend to more.

It is necessary here to observe upon the case of *Brett* and *Rigden*, which has frequently been cited as an authority against the law as laid down in the preceding case, that there was no determination of this point on that occasion, for that case as to this question was no more than this— A man, having lands in a certain parish or place, made his will, and thereby gave away all his lands in that parish: and, afterwards, and some time before his death, he purchased other lands in the same parish. The question was,

Bret v. Rigden,
Plowd. Com.
341. vid. Lord
Trevor's Arg.
on Arthur v.
Bockenham,
Gilb. Dev.
165.

Whether these new purchased lands should pass or not? and it was held that they would not. But although Lord *Dyer* did give the testator's "not having" the land as a reason for his opinion as stated, yet it seems, according to the state of the argument in *Plowden*, that the Judges did not rest their judgment *on this question*, Whether the devisor could devise lands he had not; but on the question, Whether the words of the will, in point of intention, would extend further than to those lands he had at the time of making the will, there being in that will no future words, or declared intention of passing any lands he should purchase *in futuro*; that judgment therefore went rather upon the supposition that the intention of the testator was satisfied in passing those lands the testator had at the time of making the will; for, there being no future words in the will, it might have been the intention of the testator, that the devisee should have the land he possessed at the time of making his will, and the heir at law have the new purchased lands by descent: And, accordingly, it was there said, that if a man devised land in certain as the manor of Dale or Whiteacre, and had nothing in it at the time of making the will and afterwards he purchased it, it should pass to the devisee; for it should be taken that it was his intention to purchase it, and if it should not pass, the will would be void to all intents.

But this latter position was denied to be law by Lord *Holt* in the case of *Bunker and Cook*, and was there considered only as a saying of Serjeant *Lovelass*, not founded upon any case or authority to that effect. And though *Holt* and *Powell*, Justices, on the first argument of this case, admitted that, if a man by his will gave lands, saying, “Blackacre which I intend to purchase,” or if a man devised an house by name and after purchased that house, such devise would be good to pass such lands or house; yet they both, upon reconsideration, changed their opinion, and clearly held that no such devise would be good.

Vid. Holt Arg.
Gilb. Dev. 135.
Bac. Max. 79.

Vid. Ca.T.Holt,
251, 253. Gilb.
Dev. 134, 135,
et vid. Rep. T.
Holt 243. S.C.

And, in support of this opinion, as to land particularly described in the will and afterwards purchased, the case on Lord Chief Justice *Saunders*’ will, cited by Justice *Powell* in the case of *Lawrence and Dodwell*, may now be considered as a case in point. His lordship, as is stated in that case, devised all his lands which he had, or afterwards should have in *Fulham*; and *Maynard* was of opinion, that the devise was not good for land there, which his lordship afterwards purchased; but *Holt* and *Pollexfen*, Chief Justices, held otherwise; it is added, that the case was afterwards agreed by the arbitrament of *Holt* and *Powell*.

L. Raym. 432.
S. C. 1 Lutw.
287, et vid.
Rep. Temp.
Holt 243.

Now

Now as *Holt* seems in this case only to have given an hasty opinion, which he afterwards changed on a similar point in *Bunker and Cook*, we may consider *Holt's* opinion in the last case as agreeing with *Maynard's* and against *Potlexfen's*.

Strode verf.
Falkland,
3 Ch. Rep. 99.

Upon this principle, it was held, in the case *Litton Strode* and Lady *Falkland*, that mortgaged estates, the equity of redemption of which had been purchased in after the mortgagee had made his will, did not pass thereby; because, until the equity of redemption purchased in, they were, in equity, only securities for money and part of the mortgagee's personal estate; and when the equity of redemption was afterwards purchased in, they were then as new acquisitions, new purchases in fee, and, as such, would not pass by a will made previous to the acquiring them.

But if a man has an equitable estate in lands, a devise of them for payment of debts will be good.

Prideaux verf.
Gibbon, 2 Ch.
Ca. 144.

Thus where, on a treaty of purchase, articles were entered into between A. and P. by which P. agreed to convey to A. lands called R. in fee. And A. made his will in writing, and devised, in general words, "all his lands to be sold for pay-
" ment

"ment of his debts and legacies," and then the lands called R. were conveyed to A. and he levied a fine thereof. The devise, it being for payment of debts, was held to be good though it was general, and the devisor was not seized at the time of the will made, and there was no new publication of the will.

And such devise will be effectual although it be a beneficial devise, and not for payment of debts,

Thus, where D. agreed for the purchase of certain copyhold lands, which were surrendered out of court to his use, but before admittance he died, having other copyholds, and having made his will after the said contract and thereby devised to the plaintiff, who was then and at his death his visible heir, all his copyholds; his wife, being *privenient ensient* at his death, was afterwards delivered of a daughter, who then became heir of the devisor. The plaintiff, taking it for granted that the copyholds, so contracted for, did not pass by the will, suffered the heir to be admitted thereunto, and held the same of the heir for twenty years, and paid her rent for that time, and had agreed so to do as long as he should hold them. Afterwards, differences arising between the heir and him about other

Davie v. Beardham, 1 Ch. Ca. 39.
Acherley *vers.* Vernon, *infra et 9 Mod. 78.*

other matters, the plaintiff exhibited his bill, *inter alia*, to have those copyhold lands decreed him; and it was declared by the court, upon the hearing, that it was clear the said copyholds, so agreed for, did pass by the will to the plaintiff; for, that the purchaser had an equity to recover the land, and the vendor stood trustee for the purchaser or whom he should appoint, till a conveyance executed. And the case of Lady *Fobaine*, in 1657, was cited, in which it was said to have been ruled, that if, upon articles for a purchase, the purchaser devise the land before the conveyance executed, and die, the land will pass in equity. And the court said, in the principal case, in as much as the plaintiff had admitted the title to be in the heir, and paid her rent, and agreed so to do, the court would not decree him the lands, but declared, that, if the plaintiff had come in time, it was proper to have been so decreed.

And the devise of such equitable interest in land will be good, although, by express stipulation, the agreement be not to be carried into execution until a future day, which occurs not until after the time at which the will bears date.

Greenhill v.
Greenhill, Pre.
Ch. 320. S. C.
2 Vern. 79.
2 P. Will. 631.

Thus, in the case of *Greenbill* and *Greenbill*, which came on upon an appeal from a decree made by Lord *Cowper*, the circumstances were these:

these: G. desired Y. to purchase an estate for him of about ten or twelve thousand pounds value in a particular situation; Y. meeting with an estate which he thought would answer his expectation, agreed for the purchase of it. Some part of the estate was customary and lay in Cornwall, and by the custom there a surrender to the use of his will was necessary to pass such lands, though otherwise they passed by lease and release as lands at common law, and so were not copyhold. Thereupon, by articles, dated 10th April 1706, between the vendors and their wives on the one part, and Y. of the other, the vendors agreed to deliver possession at Michaelmas following, and to execute sufficient conveyances thereof, and Y. covenanted to pay the purchase-money at Michaelmas, when possession was to be delivered. In June following, G. for whom this estate was purchased, made his will, and thereby devised all his personal estate to be sold, and the money to be laid out in the purchase of lands, to be settled, together with his *freehold estate*, on the plaintiffs; and, in another part of the will, devised all his lands of inheritance to the plaintiffs and their heirs: at Michaelmas following possession was accordingly delivered to Y. and the money paid, but conveyances were not executed till about a year after; then G. died without re-publication of his will: and the plaintiffs brought

their
Finch. 201.
Gilb. Eq. Rep.
77. Prideux v.
Gibben, 2 Ch.
Ca. 144, et vid.
1 Vez. 494

their

their bill against Y. and the heir at law, to have conveyances executed to them pursuant to the devise. The defendant Y. by his answer confessed the trust. The question was, Whether this will was sufficient to pass the trust of these lands? And Lord *Cowper* had decreed that it was. From which decree an appeal was now made.

Ibid.

Those who contended for the reversal of this decree, took a distinction between an agreement for the immediate purchase of lands, and such an agreement for the future purchase thereof as this was; they admitted, that if the articles had been for the present purchase of these lands, the vendor would have been a trustee presently for the purchaser, and then such devise of them been good in equity: but they argued, that as, in this case, the possession was not to be delivered till Michaelmas following, nor any money to be paid before that time, the purchaser had no power to devise them sooner, no more than he would have had to devise lands that he should afterwards purchase. It was likewise urged, that these customary lands could not pass by the will, for want of a surrender previous thereto.

Ibid.

But it was argued on the other side, and agreed by the court, that these lands were bound imme-

dately from the execution of the articles, and that the possession not being to be delivered till a future time made no difference in equity; that, if G. had died before *Michaelmas*, the equity would have descended to his heir, and that the heir might have brought a bill against G.'s executors to compel the payment of the purchase-money out of the personal estate; that, in this case, the money was bound by the covenant, and if the plaintiffs should not have the lands, they would lose both money and lands too; for if the money had been at liberty, that would have passed by this will to the plaintiffs; but now *that* being bound by the covenant, if they could not have the lands, they must lose both.

And such estate, so contracted for, will pass by any general or sweeping words in a will.

Thus, where A. seised in fee of several manors and lordships, and possessed of a large personal estate, made his will, 12 August 1745, devising thereby, subject to an annuity, his three manors of S. R. and T. and all his messuages, lands, tenements, and hereditaments in the county of B. or elsewhere in any part of *England*, to the use of B. for life, with remainders over. It appeared that in 1743 there was a treaty between C. as agent for D. and E.—and F.

Potter v. Potter,
1 Vez. 437, ^{as}
vid. 1 Vez.

494

as

as agent for A. for a purchase of lands; and one question was, Whether the lands so contracted for would pass by the *general words in the will*, after the enumeration of the particular estates? As to which point Sir John Strange, then Master of the Rolls, was clearly of opinion, that such general words would carry any estate to which the testator was entitled, either in law or equity, at the time of the devise made.

In the last-mentioned case a question arose, What should amount to such an agreement as would vest such an estate in the purchaser, in equity, as might be devised by a will made previous to such contracts being carried into execution? And the court was of opinion, that any contract which a court of equity would enforce on an application for a specific performance, was sufficient to give such equitable title.

Ibid.

The circumstances in the case of *Potter and Potter*, material as to this point, were these: The treaty for that purchase was made between agents of the vendor and vendee, in 1743; the plan and particular of the estate was delivered to the agent for the vendee June 7, 1774; the parties met, a price was fixed, and it was agreed by parol, that the purchase should be completed the Christmas

mas

mas following. In July 1744 the title deeds were delivered to the agent for the vendee, to abstract and deliver to his counsel, which was done April 1745. Further proceeding was interrupted by a claim put in by a stranger to part of the estate. A bill was filed, and, thereupon, a reference made to a Master to enquire into this contract, who reported, in February 1746, that it was a beneficial contract. The next day, the agent for the vendee received directions from him to draw conveyances, which he did, by preparing a lease and release to make a tenant of the freehold and inheritance for suffering a recovery to the use of the vendee and his heirs, and a deed of bargain and sale, which were approved of by the vendee, to whom they were carried 17th September 1747, and afterwards by him returned to be ingrossed. They were actually ingrossed during the life of the vendee; but his death intervening, prevented their being executed as intended. The other intermediate occurrences were, that the agreement as to the price being in 1744, application was made not to fell any wood that winter, because the estate was contracted for, and the purchase was intended to be completed; that the vendee's agent went down frequently, and let the estate as he pleased, because it was looked on as contracted for; and that, as to the claim put in to a part of the

P estate,

estate, it was offered on behalf of the vendee to advance money to complete the agreement, and a note given, that, whereas the vendor's agent had agreed to pay a certain sum to the claimant for a conveyance of his title, the vendee agreed to pay £. 100 part thereof, if the agent for the vendor should assign the said title to such person as the vendee should appoint.

Ibid.

The question was, Whether, under these circumstances, there was such a title in the vendee, as he could pass to a devisee by his will, made 12th August 1745 ?

Ibid.

And it was contended by those who argued against the devisee, that these lands would not pass by the will : First, Because the testator had no title to them before the will made, there being no written agreement between the parties. Secondly, That although an agreement not in writing, if admitted between the vendor and vendee, would be out of the statute of frauds, and so it would be if there were other circumstances, such as the party's paying the money, &c. yet that there was no precedent in which the courts had said, that, where there was a waiver of the first agreement, and a new one gone into, the new should have relation to the original agreement ; and this was that case, for the time of

of giving the note was the æra of the valid contract to bind the parties. And they distinguished this case from those where the thing agreed on was to be carried into execution by several subsequent acts, as, there, the first act was the foundation of the whole, and, therefore, a court would say there should be a relation to make it good; but this was not such a subsequent act as was necessary to carry the former into execution. But, Sir *John Strange*, Master of the Rolls, said that, on the best consideration he could give it, this estate, so contracted for in the life of the testator, must be considered, in equity, as his estate; and though there was no occasion to rest this on the will itself, yet he strongly inclined to think that the will itself would pass the estate. One circumstance only was wanting, the reducing this agreement into writing according to the statute of frauds, which, if done in June 1744, no doubt could have been entertained but that this had been his estate in equity from that time. But, though an agreement was not reduced into writing and signed by the party, yet, it was well known, that, if confessed or in part carried into execution, it would be binding on the parties, and carried into further execution as such in equity; and here was the fullest admission thereof. It must therefore be decreed according to the case Eq. Ca. Abr.
19.

in equity cases abridged and the constant doctrine in that court. It would be the same, where the vendor came for specific performance and the agreement was admitted. No doubt but that, on such admission, it would have been considered as an agreement from the time of the transaction; so that, on a bill by either party, the court must have decreed the estate as the testator's from June 1744, and the money the vendor's. As to any partial execution before the will, it was so far carried into execution, as to supply the want of writing. The plaintiff was agent to his father who approved of the agreement; it was therefore such a carrying into execution on their parts, as would have entitled the vendor to have gone on with the purchase. He could not consider the taking the note, &c. as waving the first agreement and coming into a new one, but rather as a farther step towards carrying the original agreement into execution, as removing an unforeseen obstacle, and with a view of proceeding in the contract. But the case was decided on another point.

Vid. inf.

But, if the lands be not articled for at the time of the will made, they will not pass in equity any more than at law.

Thus,

Thus, upon a bill filed by L. for the performance of articles for a purchase, the case was, that L. did, by attorney, enter into articles with P. for the sale of lands in *Cornwall*. The articles were dated *November 1725*, and thereby L. agreed to convey certain lands to P. and his heirs on or before the *Lady-day* then next following; upon the making of which conveyance, P. covenanted to pay £. 1,500 to L. P. lived until after *Lady-day*, but, in 1722, long before the executing these articles, made his will, by which he devised all his real estate to his son R. P. for life, remainder to his eldest son J. P. for life remainder to his first, &c. son in tail, with remainders over, and bequeathed all his personal estate to trustees, to be invested in lands and settled as above. P. died soon after *Lady-day* 1726, and R. P. his eldest son and heir laying claim to the lands, as descending to him, devised the same, and soon afterwards died, leaving J. P. his son and heir, to whom P. the first testator had devised all his estate expectant upon the death of R. P. And one question was, Whether, under the will of P. the devisees of R. P. the son, or the grandson, were entitled to the lands thus articed to be purchased, it being agreed that the purchase-money was to be paid by the executors of P. the original de-

Langford v. Pitt,
2 P. Will. 629.

visor? And, on behalf of the grandson, it was contended, that, when P. devised all his real and also his personal estate to be laid out in land for the benefit of his grandson J. P. after the death of his son R. P. either in one shape or other these lands, thus agreed to be purchased by P. would pass. That nothing could be plainer than his intention to dispose of all his estate, both real and personal; and the case of *Greenbill* and *Greenbill* was cited as in point. But the Master of the Rolls, admitting that case as law, alledged, that there was this material difference between the two cases; viz. that, in the case of *Greenbill* and *Greenbill*, the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but, in the present case, P.'s will was made prior to the articles for this purchase, which was before he had any equitable interest in the lands; consequently, when he had no kind of title he could devise nothing: so that this interest in the lands gained by P.'s articles descended to his son R. P. as heir at law, and his devise thereof was valid.

Per Holt in
Bunker v.
Cook, Ca.
T. Holt 253.

But, if a man hath a manor and devise it, and, before his death, a tenancy escheat, this tenancy will

will pass by the will ; because the manor is devised, and the tenancy is part thereof, and not a different thing.

Fitzg. 231.
vid. 5 Co. Rep.
5 a.

But if the devisor, after the devise of the manor made, had purchased the tenancy, it would have been otherwise ; for that which is purchased is not parcel of the manor, because it is acquired by the devisor's own act.

Quare et vid.
5 Co. 6. b.

But the Lord Chancellor, in the case of *Prieaux* and *Gibbon*, said, that if a man devised all his land for payment of debts, and afterwards purchased lands, he would decree a sale thereof, although there were no articles for the purchase preceding the will.

2 Ch. Ca. 1443

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THE FROGS DECEASABLE.

IN the consideration of this part of our subject, as has been before observed, we shall only have occasion to refer to those parts of the statutes of wills that apply to lands held in soccage, the statute of 12 Car. II. c. 44, having, by turning other tenures into soccage, extended the testamentary power to lands in general.

By the 1st, 2d, and 3d sections of the 32d Hen. VIII. c. 1. it is enacted, that all and every person and persons having, or which thereafter shall have any *manors, lands, tenements, or hereditaments*, holden in soccage or in the nature of soccage tenure, and not having any manors, lands, tenements, and hereditaments, holden of the king by knights service, by soccage tenure in chief, or of the nature of soccage tenure in chief, nor from any other person or persons by knights service (from the time therein mentioned) should have full and free liberty, power, and authority, to give, dispose, will, and devise, as well by his last will and testament in writing, or

or otherwise by act or acts lawfully executed in his life, all his said *manors, lands, tenements, and hereditaments*, or any of them, at his free will and pleasure: and that all and every person and persons having *manors, lands, tenements, or hereditaments*, holden of the king, &c. in soccage, or of the nature of soccage tenure in chief, and having any other manors, lands, tenements, or hereditaments, holden of any other person or persons in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements, or hereditaments, holden of the king, &c. by knights service, nor of any other lord or person by like service, from the time therein mentioned, should have full and free liberty, power, and authority, to give, will, dispose, and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said *manors, lands, tenements, and hereditaments*, or any of them, at his free will and pleasure, &c. saving to the king his primer seisin, and his fines for alienation, &c.

Some doubts having risen as to the construction of several parts of the above statute, and, particularly, as to what the legislature intended, in the 7th section, by the words “estates of inheritance,”

"tance," the 34 and 35 Hen. VIII. c. 5. was passed to explain the former statute.

That statute, reciting that divers doubts, questions, and ambiguities had arisen, been moved, and grown by diversity of opinions taken in and upon the exposition of the letter of the statute 32 Henry VIII. enacts, in the third section thereof, "that, whereas it is contained in "the former statute, that all and singular person "or persons, having any manors, lands, tene- "ments, or hereditaments of the estate of in- "heritance, should have full and free liberty, "power, and authority to give, will, &c. as well "by his last will and testament in writing, &c. "his manors, lands, tenements, or hereditaments, "or any of them, in such manner, &c. that these "words *estate of inheritance* shall be expounded, "taken, and judged of *estates in fee-simple only*." And by section 4, "all and singular person and "persons, having a sole estate or interest in fee- "simple, or seised in fee-simple in coparcenary, "or in common in fee-simple of and in any "manors, lands, tenements, rents, or other here- "ditaments in possession, reversion, remainder, "or of rents or services incident to any reversion "or remainder, and having no manors, lands, "tenements, or hereditaments holden of the "king,

" king, his heirs or successors, or of any person
 " or persons by knights service, have full and free
 " liberty, power and authority to give, dispose,
 " will, or devise to any person or persons, &c. by
 " his *last will and testament* in writing, or other-
 " wise by any act or acts lawfully executed in his
 " life, by himself solely, or by himself and others
 " jointly, severally, or particularly, or by all
 " those ways or any of them, as much as in him
 " of right is or shall be, all his manors, lands,
 " tenements, rents, and hereditaments, or any of
 " them, or any rents, commons, or other profits,
 " or commodities out of or to be perceived of
 " the same, or out of any parcel thereof, at his
 " own *free will and pleasure*, &c."

In the consideration of this part of the statutes
 of wills, three objects occur.

First, To what things the words Lands, Tene-
 ments, and Hereditaments, &c. apply.

Secondly, What estates the devisor must have
 therein.

Thirdly, What estates a devisor may create by
 devise.

First,

First, all lands not devisable by custom (as we have seen) previous to the statutes of wills, are by those statutes rendered devisable.

But a distinction, as has been observed, was made as to tenements and hereditaments, between those that were valuable, and those that were not valuable, it being held that the latter were not devisable. The reason of which has been explained.

Vid. supra 41,
45.

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Clere vers.
Peacock, Cro.
Eliz. 350.
2 Anders. 21.

Upon this ground it became a question, in the case of *Clere* and *Peacock*, whether an advowson in gross held in *capite* was or was not devisable. The case arose on a *quare impedimentum* between *Clere* plaintiff, and *Peacock* defendant. The plaintiff declared that F. was seised of the advowson of D. in fee, and devised the same for ten years, the remainder over in fee. The defendant, by his bar, confessed the devise for years, &c. whereupon it was demurred; and one cause of demurrer was, that the advowson was not devisable; for it was not valuable, nor within the intent of the statute. But *Walmesley*, *Beamond*, and *Owen*, Justices, held against the opinion of *Anderson* Chief Justice, that it was well devisable; for the body of the statute of wills was, that lands, tenements, and hereditaments might be devised; and an advowson was

Ex vid. Sir W.
Jones, 17, 23,
27, 1 Atk. 619
—621. Robin-
son v. Tongue

was an hereditament departable, as between sisters, and dower might be thereof and it was valuable, namely, twelve pence in the pound, as 12 Henry VIII. 8. and other books shewed.

³ Brown's Par. Ca. 557. Westfaling v. Westfaling, 3 Atk. 460, an advowson is assets.

An advowson is included under the term termed "nement :" And therefore where the king gave licence to purchase lands and *tenements* in mortmain to the value of 100*s.* the person licenced was allowed to purchase advowsons.

Hob. 303, 304, et vid. Westfaling v. Westfaling, infra.

33 E. 3.

And an advowson will pass by the description of all hereditaments situate, lying, and being in T. where the church lies.

Dyer 323, Pl. 30.

But it was held by Lord Hardwicke, in the case of *Westfaling* and *Westfaling*, that an advowson in gross would not pass by the word Lands, although it would by the words Tenements or Hereditaments. In this case it appeared that W. deceased had several kinds of estates of inheritance, consisting of freeholds and copyholds, and also the advowson in gross of L. and likewise estates *pur autre vie*, and was possessed of a considerable personal estate; and, being so seised and possessed, made his will, and thereby, amongst other things, devised to his trustees all his *freebold lands* not under settlement, and whereof he was any ways seised or possessed, or any way interested

Westfaling vers. Westfaling, 3 Atk. 460.

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in in law or in equity, either in possession, reversion, or remainder, *which be bad any power to devise or dispose of*, and also all and singular his leasehold estates and lands whatsoever, excepting only such as were thereinbefore devised upon certain trusts therein mentioned. On this will it was contended, that, by the words *all his freebold lands*, the advowson, though an incoporeal inheritance, would pass: But, Lord Hardwicke was very clear, that the advowson did not pass by the will; for his lordship said, that there was no authority that an advowson would pass by the word *lands*, though it would by the word *tencaments or bereditaments*.

But if the will had described lands at a particular place, and the testator had had nothing belonging to him there but an advowson, it seems that, rather than the will should be ineffectual, the advowson would be held to pass thereby; for that case would fall within the principle of the case in Styles, where, by the words “*fee simple lands*,” a portion of tythes were held to pass, there being nothing else belonging to the testator at the place mentioned but the tythes. But the rule of law is, *that if there be estates that properly pass by the words of a will, it shall not be extended to such estates as do not properly pass thereby*.

Styles 261, 278.

A donative may be devised. Thus a devise by D. of the patronage of the church of Waltham, and of the right of nominating a minister to officiate there, (it being a donative, the abbey being of royal foundation) to six trustees and their heirs upon trusts therein mentioned, was held good and valid.

Attorney Gen.
ad Relat Tracy
et al. v.
Floyer, et al.,
2 Verm. 748.

But it seems questionable, whether an appropriation, or the advowson of it, will pass by the name of an advowson. Hob. 304.

The next presentation to an advowson may also be devised; and a devise of the *next* turn or presentation, carries the next turn of presenting absolutely to the devisee, and not merely the right of getting himself presented.

Thus, where W. by will, "gave to J. L. the "next turn or presentation of the church of G. "after the death of P. the then possessor, and, "after the death of J. L. to revert to the heir "of P." it was contended, by the heir at law of W. that this was only a gift to L. of the right of being presented himself not of a right to present a stranger. And it was said that, in effect, it was a devise to the heir at law in trust to present the devisee to the next turn, and that the testator never meant to give the plaintiff a power of lapsing

Law v. Bishop
of Lincoln, et
al. 2 Blackst.
Rep. 1240.

lapsing the living to the bishop; that the subsequent words of the devise, that the living should revert to the heir on the death of J. L. shewed, that J. L. was intended to be the person presented to the living, and that, if he refused to take it, the heir might present another. *Sed per Gould, Blackstone, and Nares, Judges.* This is clearly a devise of a legal interest. There is no hint of any trust being reposed in the heir at law. The next presentation is devised in clear and explicit words. And consequently the devisee is clearly intitled to the first turn, and is not bound to present himself, but may give it to whom he will.

Ibid. 1242.

And Mr. Justice *Blackstone*, in the last mentioned case, much questioned whether such a qualified right, as it was there contended that the devisee took, could subsist at the common law. He said he was sure there was no remedy for it; for the *quare impedit* never named the clerk to be presented, it only removed the obstacle of presenting *idoneum clericum*, not A. B. C. and more especially not *seipsum*.

By the devise of an advowson the next presentation passes.

And the law is the same, although the devisee be himself incumbent of the advowson devised.

Thus

Thus where A. purchased an advowson to him and his heirs, and, being parson and patron theréof, afterwards made his will in writing, and made three executors, and willed that they or any two of them should present W. T. to the said church upon the next avoidance, and afterwards devised it to J. T.—W. T. refused the execution of the will. It was objected, that the presentation arising upon the death of A. was a flower fallen, and so not to be granted after his death, when the devise was to take effect. But *Coke*, Chief Justice, and *Croke*, *Haughton*, and *Dodderidge* were of opinion, that although this was given, so that the instant the devise should take effect by the death of the devisor, at that very instant by his death the church became void, yet it was a good devise; for, notwithstanding the testament had no effect but by the death of the devisor, yet it had *an inception* in his life, and that made it good. And the court distinguished this from the case of a grant of the next presentation *fallen* in a man's life, which could not be made.

Harris vets.
Austin, 3
Bulst. 36. S.C.
1 Roll. Rep.
210. S. Point,
Sir E. Pynchin
v. Harris, in
Excheq. Cro.
Ja. 371. et vid.
S. L. Hill ver.
Bishop of Lon-
don, Smith et
al. 1 Atk. 619.

Dyer 456. 3.

And, in the last-mentioned case it was said by *Haughton* and *Dodderidge*, that, although W. had not refused the executorship, and he could not have presented himself, yet the other two executors might have presented him. The will was,

3 Bulst. 40, 43.

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.that

that the executors, or any *two* of them, should present one. The authority here remained jointly in them, notwithstanding one of them had a right to the advowson.

Vid. Plowden
210. 1 Leon.
34. Cro. Eliz.
113, 114.

But it seems that an advowson of a vicarage belonging to a prebendary would not pass by a devise of the prebendary *cum omnibus commoditatibus, emolumentis, proficuis, et advantagiis cum pertinentiis eidem prebend. spectant. seu aliquo modo pertinen.* for the words commodities, emoluments, profits, and advantages to the prebendary belonging are of one sense and nature, and are to be understood of those things whose nature is gainful and commodious, as common of feed, estovers, and the like that belong to land. *Sed quære* for the principal case was of a lease.

Rents are devisable, either by the custom, or by the express words of the statute 34 Hen. VIII. but the statute 32 Hen. VIII. doth not extend to them.

Litt. sec. 535.
Cro. Eliz. 805.
3 Co. Rep.
33 h. 33 E. 3.
tit. Dev. 21,
22 Att. 78,
Adj. 1 Mod.
96, 112. 2 Lev.
87. Cro. Eliz.
652. Harg.
Edit. Co. Litt.
111, note 5.
* Dyer 5, b. 1.

And where lands are devisable by the custom, rents out of them follow the nature of the reversion or seignory to which they are incident, and are devisable likewise.

But this seems to have been formerly doubted*, for Montague moved this case. K. was seised of

land devisable, and made a lease for years rendering rent, and devised this rent to a stranger and died, and the stranger was seised of the rent and died. And *Baldwin*, Chief Justice, and *Sbelley*, Justice, said, that this rent was not devisable, because it was a new thing, and the custom did not run to it.

Tythes also, of which a man is seised in fee,
may be devised as hereditaments.

Swinb. 140.
Styles 261.

Manors may be devised either by custom, or
by the express words of the statutes.

3 Co. 32 b.

So franchises, if valuable and not restrained to the person of the grantee and his heirs, are devisable.

And franchises not valuable may pass by devise, as appurtenant to other things valuable.

Thus it was held in *Butler and Baker's case*, that if a man be seised of a manor to which a leet or waif and stray, or any other hereditament which is not of any annual value is appendant or appurtenant, there, by the devise of the manor with the appurtenances these shall pass as incidents to the manor; for, inasmuch as the statute enables him by express words to devise the

Butler v. Baker.
3 Rep. 32.

manor, by consequence it enables him to devise the manor with all incidents and appurtenances to it: and it was never the intent or meaning of the parliament that, when the devisor had power to devise the principal, he should not have power to devise that which was incident and appendant to it, or that the manor, &c. should be dismembered, and fractions made of things which by lawful prescriptions have been united and annexed together.

ibid 332.

So if a man hath a hundred, with the goods of felons, outlaws, fines, amerciaments, return of writs, and such like casual hereditaments within the hundred not valuable in themselves, *and such hundred with the said casual hereditaments have been accustomably let to farm for a yearly rent*, then it may be devised within the purview of the said acts; because the uncertainty hath been reduced to an annual value according to the purview of the said acts.

Claims to villains were of as late date as 15 James.

Vid. Harg.

Arg. in slave cause 27, he was saleable and transmissible, Bac. Hist. of Law, vol. 16.

A villain in gross seems also to have been devisable, so long as that kind of property subsisted; for he is stated to have been a species of personal property, saleable, transmissible, and inheritable. The villain regardant passed with the manor or land to which he was annexed, if that might be devised either by custom or by statute.

An

An annuity in fee is also devisable.

A personal annuity is distinguished from a rent, inasmuch as the latter is a burden imposed upon and issuing out of lands, whereas the former is a yearly sum chargeable only on the person of the grantor. Co. Litt. 144.

Thus much being observed, as to what kinds of things the words Lands, Tenements, and Hereditaments in the statutes apply to, we now come to the second subject pointed out for our consideration; namely, what estate or interest the devisor must have in such things to enable him to devise them.

And, on this head, it is observable, that there is a striking distinction between the customary right to devise, and the power under the statute; for the custom, where it warranted a devise of lands, was general, that every one seised of land might devise it; whereas the statute of the 32d of Henry VIII. as explained by that of the 34th Henry VIII. extends to those having estates in fee-simple only; consequently none are thereby authorised to devise, who have not an estate in fee-simple in the thing devised.

Plowd. 557.

Now there are several estates of inheritance in lands, which are termed estates in fee-simple.

Ibid.

The first is a fee-simple absolute ; and that is, where lands are given to a man and his heirs absolutely, without any end or limitation put to the estate.

Ibid.

The second is a fee-simple determinable ; which is where land is given to a man and his heirs as long as another man, viz. J. S. shall have heirs of his body : there he to whom the land is given has a fee-simple, but his estate is determinable upon the death of J. S. without issue, for then the fee is ended. So if land be given to a man and his heirs, as long as he shall pay 20 s. annually to A. or as long as the church of Saint Paul shall stand, his estate is a fee-simple determinable ; for in these cases the donee has the whole estate in him, and such perpetuity of an estate which may continue for ever, though at the same time there is a contingency which when it happens will determine it, is a fee-simple.

Ibid.

The third is a base fee ; which arises where a man makes a gift in tail, and the donee is attainted of treason ; in that case the king and his heirs

heirs shall have the land as long as there are any heirs of the body of the donee. So if tenant in tail, by indenture inrolled, bargain and sell the land to another and his heirs, and afterwards levy a fine to the bargainee, the bargainee has a fee in the land; but it is only to endure as long as tenant in tail has heirs of his body, and is therefore called base, as compared with the pure fee that is in the original donor, which has an absolute perpetuity belonging to it.

Besides these, there is another inheritance, which is called a fee-simple conditional (*i. e.*) qualified by a condition; as an estate to a man and the heirs of his body, or to a man and the heirs male or female of his body; in which cases, if a man has not an heir of the description mentioned in the grant, the land reverts to the donor, but if he has such an heir, the land becomes, from the time of having such an heir, absolute in the donee. So that this kind of fee differs from a fee - simple determinable, inasmuch as the former, by performance of the condition (*i. e.*) by the donee having an heir of the description named, changes its nature and becomes absolute; whereas the latter always continues in its original state, determinable whenever *that* fails, during the existence of which alone it is intended to continue in its original creation.

^{2 Blackst. Com.}
^{110.}

Since the statute *de donis*, this species of estate is confined to personal hereditaments only; real hereditaments so limited, being from that period considered as of another description, viz. as estates tail.

Per Coke et
Doddridge,
3 Bulst. 184.

All these different kinds of fee-simple estates are clearly devisable within the statutes of Henry VIII. for the word Fee-simple is used in the statute in its largest sense, including as well conditional or qualified as absolute fees, in opposition to estates in tail, or *pur autre vie*.

Fees-simple may again be considered with regard to the various relations which they have to the possession of the thing on which they attach as lands, tenements, &c. in which view of them they may be divided into fees simple in possession, and fees simple not in possession.

Fees-simple are then said to be in possession when no estate or interest is interposed between the right to and the possession of the thing; as where the possession is immediately in tenant in fee-simple.

Fees-simple not in possession are either where the enjoyment of them expects the accomplishment of something else that must antecede them,

or

or where the right or estate is immediately in the party, but the possession thereof is removed or detained by another. Those circumstanced in the latter predicament, we have seen, are not devisable within these statutes. Supra, 35, 184.

Fees-simple in the former of the predicaments last mentioned are of several kinds.

First, Reversions.

A Reversion, though a present interest, yet stands in a degree removed from the possession, till the particular estate that precedes it is determined.

Secondly, Remainders.

A Remainder stands in a similar predicament.

A reversion differs from a remainder inasmuch as a reversion is that which is left in a man who creates a particular estate, and a remainder is that which passes from a man at the time of a particular estate made, and is created together with such particular estate.

Plowd. 154.
Vaugh. 269.

Thirdly, Contingent Interests; or interests and estates limited to take place upon a precedent condition;

condition; which occur in cases of accruers of rights upon events dubious and uncertain.

Fearn's Contin.
Rem. i.

Of this description are executory devises, estates to be enlarged upon condition, other conditional limitations and uncertain interests reducible to no general head, contingent remainders, and future uses.

Fourthly, Estates subject to a condition of re-entry, wherein he that has the benefit of the condition, though he has an estate in the condition, yet he has not the land until the condition broken and a re-entry.

Vid. Cowper
vers. Franklin,
3 Bulst. 184.

Supra 34, 46.

Any of these estates or interests in things devisable themselves, except those comprised under the third and fourth divisions last mentioned, may be devised by the owner thereof, all together or in part.

Leonard Lovie's case,
10 Rep. 78 a.
et vid. Sir Litton Strode
vers. Lady Falkland, 2
Vern. 621.
Willows vers.
Lidcot, 2 Vent.
285. Alleyn 28,
1 Lev. 212,
Fitzgib. 231.
Supra 227.

Thus, although it was contended, in *Leonard Lovie's case*, that a reversion was fruitless, and not of any yearly value as long as an estate tail that preceded it continued, and therefore that it was not within the statutes of wills, but fell under the distinction taken as to things not valuable in *Butler and Baker's case*. It was resolved, that there was a difference between hereditaments, which

which of their nature were not of any annual value, and things which, in their nature, were of an annual value, but, in respect of a gift or lease, *absque aliquo inde reddendo*, were not of present value as in the principal case ; for, although the reversion in *præsenti* was not of any annual value, yet the land itself was of an annual value; and that therefore such reversion was devisable.

So it was held in *Beddingfield's case*, that a reversion in fee expectant on an estate tail, seck and fruitless, was within the statute 34th Hen. VIII.

Beddingfield's case, cited
to Rep. 8^e
b. et Wins-
more vers.
Hobert, Hob.
313.

And a remainder vested, expectant after an estate tail, was also devisable within the custom of devising, and is within the reason of *Beddingfield's case* and *Lovie's case* in respect of the statutes of wills.

Fitzh. Dev. 13-
1 Roll. Abr.
609. F. 2.
27. Aff. 60.
Co. Litt. 111.
vid. 31. Aff. 3.
Cont. 21. S. C.
1 Roll. Abr.
609. F. 1 vid.
reason supra,
147. viz. feme
covert was de-
visor.

Estates in fee-simple are either legal or equitable.

Equitable estates are where trustees are interposed for the purpose of effectuating particular objects of the creator of such estates ; the estate of *cestui que trust* in such cases was formerly styled an Use.

We have already seen, that uses were the medium through which devises were rendered universal previous to the statute of the 27th Hen. VIII. which, by transferring the possession to the use, converted them into legal estates; it is only necessary here to observe, that such uses or trusts as have been since retained in equity, not only as partaking of the original nature of an use, but also as hereditaments, still continue devisable.

¹ Leon. 257,
per Wray.

A trust estate suspended may also be devised. Thus, if feoffees to uses before the statute of the 27th Henry VIII. had been disseised, by which disseisin the use would have been suspended, and afterwards, during the disseisin, *cestui que* use had, by his will, devised that his feoffees should re-enter, and then make an estate to J. S. in fee. This would have been a good devise; for, by that disseisin the *trust* and *confidence* reposed in the feoffees was not suspended, though the estate was.

Manning vers.
Andrews,
¹ Leon. 256.

So a devise of an use before 27th Henry VIII, by one seised with seven others, unto the use of himself and his heirs was held good by the court unanimously: and yet the use was in part suspended, because he was jointly seised with seven others to his own use, and so the use for the eighth part suspended.

The

The principle, upon which the preceding case turned was, that, when the devise was to take effect, viz. at the time of the devisor's death, all the possession of the land by the survivor passed from the use, and then the use being withdrawn from the possession would pass.

The third head of inquiry in this chapter is, What estates may be devised by persons, having any estates or interests in things devisable by virtue of the statutes or by custom.

A fee-simple absolute may beyond doubt be devised by tenant in fee-simple absolute.

And a fee-simple, absolute, being of greater extent and latitude than any other fee-simple, it follows of course that any other fee-simple less than a fee-simple absolute, that can be created by act of the party and does not arise by act of law only, may be created by devise.

Thus, one having a fee-simple absolute in possession, or in reversion, or remainder in an hereditament, may devise a fee-simple conditional therein, *if the subject on which it is to attach be not within the statute de donis*; as a devise of an annuity to one and the heirs of his body, &c.

Gates v. Holy-
well, 3 Leon.
216.

So likewise a determinable fee may, by devise, be carved out of a fee-simple absolute. As where one devised that his eldest son with his executors should take the profits of his lands until his youngest son should come to the age of twenty-two years, and then that the younger son should have the lands to him and the heirs of his body. It was the clear opinion of all the Justices, that the eldest son had a fee-simple in the lands until the younger son came to the age of twenty-two.

One having a fee-simple absolute in lands or tenements in possession, reversion, or remainder, may also, by devise, create a fee-tail ; as if he devise his lands to one and the heirs of his body.

10 Rep. 97, 98,
Hearn v. Al-
len, Cro. Car.
57. 10 Rep.
97. Salk 231.

Sed vid. infra,
as to execu-
tory devises,
which, in some
degree, are
evasions of this
rule of law.

But a fee to take place after a fee, whether the latter be absolute, conditional, or determinable, cannot be created by devise ; because either of these fees exhausts all the interest or estate which the law considers as vested in the person of the devisor in any hereditament devised, and conveys to the donee the whole estate. And therefore no reversion expectant is left in the devisor out of which a remainder expectant, in the strict sense of the word, may be limited ; for, when all the estate a man has is given away, nothing can remain : and a fee-simple contains all the estate

a man

a man can have in him ; and, consequently, after he has limited that, no other or further estate remains in him to dispose of.

Therefore if one devise land to A. in fee, and if he die without heir, that B. shall have the land, this devise to B. is void ; for that one fee-simple cannot depend upon another fee-simple by the rule of law.

And the rule of law is the same as to a fee-simple conditional.

Thus it was held by Lord *Hardwicke*, in the case of *Stafford* and *Bulkley*, that where a personal annuity, having no relation to lands and tenements, nor partaking of the nature of rent, was directed to be settled to one for life, and the heirs of her body, that the limitation must be of a fee-simple conditional, and that, consequently, no remainder could be limited over theteupon ; for no remainder could be created of any such estate not within the statute *de donis* ; for, before that statute, it was but a possibility of reverter, out of which a remainder could not be limited, upon this notion, that, being upon a possibility, it could not be grantable over ; and, if before the statute *de donis* a man had granted lands to another and the heirs of his

Stafford v. Bulkley,
2 Vez. 180.
Turner v. Turner,
Brown's Rep.
Chan. 326.

his body, and said, in default of such issue to B. and his heirs, that grant over had been void.

But, the statute *de donis* altered the nature of these conditional fees, when applied to real hereditaments ; the construction of that statute being, that the donee or devisee has no longer a conditional fee-simple, but that, by the statute, the estate is divided into two parts, leaving in the donee or his alienee a particular kind of estate denominated a fee-tail, and *vesting* in the donor the ultimate fee-simple of the land expectant on the failure of issue, which expectant estate takes effect as a reversion or remainder.

¹ Roll. Abr.
669, F. 2.
Co. Lit. III.

Therefore if one, having lands, tenements, or hereditaments, favouring of the realty, in fee-simple, devise the same to A. for life, remainder to B. in tail, remainder to C. in fee ; this devise of the remainder in fee will take effect out of the reversion expectant on the determination of the fee-tail, and will be valid although an estate in fee-tail precede it.

And one having a fee may devise an estate less than a fee, as an estate to one for his own life, or for the life of another. And the devisee thereof may, by virtue of such devise, immediately

ately upon the death of the devisor, enter upon the thing devised.

If a devise be of an estate for life only, the reversion will descend to the heirs of the devisor and vest in them.

But a tenant in fee-simple having, after such devise for life or in tail, a further estate remaining in himself, part of the fee-simple, may proceed further, and devise other estates to take effect upon the expiration of such estate for life or in tail, until he has exhausted his whole fee.

But a doubt was formerly entertained, whether, when the devise itself created a thing *de novo*, and was not the disposition of a thing already in being, a remainder thereof could be limited to take effect after an estate, less than a fee, disposed of thereby in such new created thing; and therefore it was held that, if a man devised a rent charge for term of life, he could not thereupon graft a remainder in fee of the same rent; the reason of which was that, the rent being a new thing, there was no fee-simple of it in the grantor, consequently, he had no reversion in him after the estate for life out of which the remainder could take effect. But this opinion was shewn to be fallacious, and over-

Plowd. Com.
35. M. 15,
E. 4. 9 a.

R turned

turned upon a full consideration thereof in the case of *Smith* and *Farnaby*, the judgment in which was affirmed in error; for such a devise is not, in law, considered as the disposition of a remainder, but as a limitation of the estate meant to be given in the thing created *de novo*, and the whole operates as an entire estate.

Smith v. Far-
naby,
Carter 52.
S.C. 1 Sid. 285.
2 Keb. 29, 55,
84. 1 Lev. 144.
7 H. 4, 6 b.
Broo. Don. 8.
8 Hen. 4. 19 b.
Colling-
broke's case,
Bra. Abr. 19.
Pl. 26. Crom-
well's case,
2 Rep. 69. et
Week's v.
Peach, 2 Lutw.
1218. Jenk.
Cent. 3c.

In the case alluded to A. seised of lands in fee, devised them to his son and his heirs, and devised a rent of £. 50 *per annum* going out of them to another son, and that, if that son should die without heirs male of his body, then the rent should remain over to another and his heirs males. And one question made thereupon was, Whether a rent, created *de novo* by grant or devise, might be limited by way of remainder? And it was held that it might; for, that this was all but one estate being by one conveyance, in like manner as if it had been to J. S. and his heirs.

Plowd. 134,
159, 17c.

The most apt and proper word to create a remainder, is the word "*remainder*" itself.

Ibid. 34, 136,
155, 190.
20 Rep. 97,
320. Co. Litt.
378. Dyer 14c.

To make a good remainder, there must be a particular estate precedent, and that must be created at the same time when the remainder is made, as a foundation to bear it up. "This par-
ticular

ticular estate must continue till the remainder vests. There must be a remnant of the estate in the lessor to grant after the particular estate granted. The remainder must pass out of the donor presently to him in remainder; or else it must be in custody of law and in abeyance. It must vest in estate either presently during the particular estate, or *eo instanti* when it doth end, not afterwards. There must be also a person capable of it at the time of the creation of the estate, or at least one that by common and ordinary possibility may be capable at the time when the remainder doth happen; and if it be to fall on a possibility, it must be such a possibility as is near, common, and ordinary; as death without issue, coverture, &c. and not remote as entry into religion, &c.

And a term *de novo* in lands may be created by devise. As where one " gave, granted, will-
ed, and bequeathed his lands to his son Tho-
mas, and to the heirs males of his body law-
fully begotten, from and after his death, for
and during the term of five hundred years
then next ensuing, fully to be complete and
ended." By such a devise the devisee has
an estate for five hundred years, so long as he has
issue of his body.

Lovie's case,
10 Rep. 78.

And the limitation, in the preceding case, being *during the term* of five hundred years, the term will determine whenever there shall be a failure of issue male.

*Hayler v. Rod,
1 Peer Will.
360.*

But, if one, seised in fee, devise to B. his executors and administrators *for ninety-nine years*, in trust for himself and his wife for their lives and the life of the survivor, and, after the death of the survivor, in trust for the heirs of their two bodies, and in default of such issue then in trust for the heirs of his own body, and in default of such issue in trust for the heirs of the survivor of the husband and wife, and the husband die without issue living the wife ; the trust of this term will be vested in the wife for the remainder of the ninety-nine years notwithstanding the failure of issue, and it will not descend to the heir at law of A. who was intitled to the reversion in fee-expectant on the term, as a term attendant on the reversion.

The *foundation* of the distinction made between the former and the latter of the two preceding cases seems to be, that in the former case the word "*term*" is understood in its technical sense, that is not merely as signifying the time specified, but also the estate and interest that passes by the lease ; and the estate and interest

terest that passes by such lease is an estate to his son Thomas and the heirs of his body; which estate may determine for want of a person to hold it (viz. an heir of *Thomas's* body) within the time of five hundred years; in which case the term, which was to be governed by the continuation of heirs of the body, will cease; but, in the latter case, the limitation, specifying the time only of continuance and limiting the trust, in case of failure of issue, to the survivor of the donee and his wife and *the heirs general* of the survivor, though a void limitation, yet is sufficient to shew the intention of the donor, that the term should not determine until the time limited elapse. *Sed quare.*

Estates limited by devise, either by virtue of the statutes of wills or the custom of devising, may be either absolute or conditional.

First, under the statutes.

As where one gives his lands to his wife for term of her life, upon condition, that she shall find *Jasper*, her eldest son, at school, and educate him in virtue and good morals at her costs, until he shall arrive at twenty-one. Such condition may be annexed to an estate given by

Dyer 126, b.
Pl. 51.

Et vid. *Guthvir v. Ashby infra,*
et Ruddall v. Milward, Sa-
ville 76.

will under the statutes 32d and 34th Hen. VIII. they giving power to the devisor to make devises "at his free will and pleasure."

Secondly, under the custom.

Dyer 126.

As where a devise was, that the executors of the devisor of lands devisable by custom should sell the land; here a condition arose by implication, and if they omitted to sell the heir might enter for breach thereof.

Dyer 348.
Pl. 13.

So where one devised certain houses in London to A. and B. in fee to hold in common, upon condition that they and their heirs should pay an annual rent, issuing out of the said tenements at the days and times therein mentioned, to the wife of the devisor during her life, &c.; the rent being in arrear and no demand made by the wife, the heir entered for breach of the condition; and his entry was held good.

And conditions in wills may be either precedent or subsequent.

Rep. Temp.
Talbot 164.

But there are no technical words to distinguish conditions precedent or subsequent; but the same

same words may indifferently make either, according to the intent of the person who creates the condition.

Thus a condition describing *the qualification* of a person who is to take, is in its nature a condition precedent; as a devise of 200*l.* to A. provided she continue with the testator's executors until she attain twenty-one; but if A. should be taken from them by her father before she attain twenty-one, or marry against their consent, then she to have but ten pounds. Here if A. marry without consent she shall not have the legacy of 200*l.* but only the 10*l.* for the marriage with consent is a condition precedent.

Creagh vers.
Wilson,
2 Vern. 573.

So where one devised lands to trustees and their heirs in trust, to pay such of his debts and legacies as his personal estate should fall short to pay, and then in trust for his niece E. his heir at law for her life, in case she, within three years after his death, should be married to D. remainder to her first and other sons, by D. in tail male, &c. This was held to be a condition precedent; for, by the will, the three years profits after the death of the testator were to be applied to pay the debts, so nothing descended in the mean time or vested.

Bertie vers.
Falkland,
2 Vern. 340.

r John Robin-
son vers.
Comyns, Rep.
Temp. Talbot,
165.

But where one devised all his lands unto A. and his heirs, to the use of B. and his heirs for payment of his debts, and afterwards in trust for C. and the heirs of her body, remainder to D. and his right heirs, upon condition that he should marry C. the condition was held to be subsequent; for, the precedent limitation was an estate tail in possession, and there was no reason to conclude but that, as to the remainder likewise, it was the testator's intent to have it vest immediately in D. The limitation was immediate, although the condition on which it depended was subsequent.

Vid. Avelyn
vers. Ward,
1 Vez. 420.

So if one devise his real estate to A. and his heirs, upon express condition that, within three months after his decease, he shall execute and deliver to B. a general release of all demands, which he may claim of his estate or any part thereof, for what cause soever. This will operate as a condition subsequent, and the estate will vest in A. to be defeated or not according to what happens afterwards.

Estates in hereditaments created by devise may be either vested or contingent.

Fearn on
Contin.Rem. 1.

An estate vested is where there is an immediate right of present or future enjoyment, in which view

view of them estates are either vested in interest or in possession.

Where there is a right of present enjoyment, the estate is said to vest in possession. As if a devise be to A. for life, remainder to B. in tail, A. dies, B.'s estate immediately vests in possession.

Ibid.

But where there is only a present fixed right of future enjoyment, an estate is said to vest in interest. As if a devise be to A. for life, remainder to B. in tail; here B.'s estate, from the very instant of its limitation, is capable of taking effect in possession, and B. has a right to enjoy it if the possession fall by the death of A. But until that event happens, B. has no right to the possession; until then, therefore, it is vested in interest only.

Ibid.

And such estate vested in interest may be either absolutely vested, or vested in suspense, as if a remainder be limited in trust for such child or children of T. M. on the body of J. S. lawfully to be begotten in such manner, &c. as T. M. and J. S. shall by deed, &c. appoint, and for want of such appointment, then, &c. to all and every the children, &c. share and share alike. This remainder vests in interest in suspense until the

Vid. 2 Vez. 118.

the father's death in such children as come in esse, liable to be varied as to the quantum of the proportions as they arise, and subject to be divested by appointment.

Fearn's
Cont. Rem. 2.

A contingent estate, as we have before-mentioned, is where a right is to accrue upon an event which is dubious and uncertain.

We have seen that, from the nature of the interest in lands, tenements, and hereditaments, recognized by the municipal laws of this country, no remainder can be limited to take effect after or rest upon any estate in fee-simple; because a fee-simple exhausting all the interest that a donor has, when the whole is granted there can be no remainder. But although the law will not recognize a remainder to take effect after the expiration of a fee, yet, by way of indulgence to a man's last will and testament, and in favour of the intention of devisors where otherwise the words of a will would be void, it permits, under certain restrictions, a fee or other estate to be substituted as an alternative in the place of a fee before limited; provided the substitution be to take effect within a reasonable period of time. Devises of this nature are called executory, because the estates thereby limited to take place, by way of substitution, have no present existence in consideration

to Rep. 95.
1 Inst. 18.
Dyer 33.

Cro. Jas. 522.

consideration of law, but merely a capacity of existence, and of being executed, i. e. taking effect, *when* the contingency upon which they are limited occurs.

Thus a devise of lands to a man's wife for life, remainder to C. his second son *in fee*; provided that, if D. his third son should, within three months after the wife's death, pay 500*l.* to C. his executors, &c. then the lands to go to D. and his heirs, is good as an executory devise.

Marks *ver.*
Marks,
10. Mod. 420.
S. C. Strange
129.

So it is if A. devise to B. *bis son* and his heirs *for ever*, and if he die without issue *living* A. then C. to have those lands to him and his heirs *for ever*.

Pell *ver.*
Brown, Cro.
Ja. 590, 1 Eq.
Ca. Abr. 187.
S. C. 2 Roll
Rep.

In the former case, C. took a vested fee-simple, and the limitation to D. was good as an executory devise to take effect if D. paid the 500*l.* within the time limited. And, in the latter case, B. took a vested fee-simple, and the limitation over to C. was an executory devise to take effect on B.'s dying without issue in the life-time of A.

If there be a particular estate with a remainder so limited, the happening of the condition will not destroy the particular estate. As if A. devise

Dyer 127, 2.

devise land to B. for life, remainder to C. in fee; provided that if A.'s wife, being enfeint, should be delivered of a son, then the lands shall remain to him in fee; and A. die, and a son be born. In such case this proviso will not destroy the estate of B. but of C. only.

**Allen vers.
Rivington,
Sid. 445.
Dyer 354, 124.
Pell and
Brown, 2 Cro.
590.**

It is necessary, in considering these cases, to observe the distinction between the words, " and " if he die without issue," (used with reference to the first devisee) standing alone, and the words " if he die without issue living A." or the like, or " before A. arrive at twenty-one years of age," &c. so used; for, the former words operate only as an explanation of the testator's intent who shall succeed, namely, issue of his body, and whensoever the devisee dies without issue, the land will remain over. But the latter words qualify the preceding estates with a collateral determination, give effect to a conditional limitation to another if such an event happen, and operate as a complete defeasance of the first fee upon that event, but by no means tend, independant of such event, to abridge or narrow the extent of the estate first limited, or to reduce it from a fee-simple to an estate tail; because the latter clause, " if he die without issue," is not absolute and indefinite, whenever he die without issue, but it is with a contingency, " if he die without issue *living A.* or " before

"before A. come to twenty-one years of age," for the first devisee may survive A. or have issue alive at the time of his own death living A. in the one case, or survive A.'s arriving at the age of twenty-one years in the other, in which cases the first estate shall not be abridged, but shall only be abridged if the first devisee die without issue living A. or before A. come to twenty-one years of age.

Thus, where the manor of D. was holden by knight's service, and A. the ancestor, &c. by his will devised the whole manor to his wife, until his son and heir should come to the age of twenty four years, and that when his son arrived at the age of twenty-four years, his wife should have the third part thereof for her life, and his son should have the residue ; and that if his son should die before he came of the age of twenty-four years without heirs of his body, the land should remain to B. The devisor died, the son came to the age of twenty-four years. And the question was, Whether the son had an estate in tail, for then for two parts he was not in by descent ? and *Dyer* and *Manwood* were of opinion, that here was not any estate in tail ; for no tail should rise unless the son had died before his full age, and therefore the tail should never take effect, and the fee-simple did descend and remain in the son, unless

Hinde and
Lyon, 3 Leon.
64.

unless that he died before the age of twenty-four years, in which case the estate would then have vested with the remainder over; but the son having attained to that age, he had the fee by descent of the entire manor.

Collinson verf.
Wright, 1 Sid.
148.
Clache's case,
Dyer 330, 331,
354. 2.
*Chadock et
Cowley's case*,
2 Cro. 695.

So in the case of *Collinson* and *Wright*, where the testator devised land to his son and heir; and if he died before his age of twenty-one years, and without issue of his body then living, then the remainder over; the son survived twenty-one years, and then sold the land and died. And the question was, If the sale was good, which depended upon whether the son was seised in fee or in tail? And it was held, that he had a fee immediately; for the estate tail was limited to commence upon a subsequent contingency.

Spalding verf.
Spalding, Cro.
Car. 185.
Bridgman,
fol. 102.
Fearn's Cont.
Rem. 307, 308.

Again there is a distinction between the before-mentioned cases, and cases where the first limitation is in tail and not in fee; as if the limitation be to J. S. and the heirs of his body *in fee*, and that, if J. S. shall die living A. then the land shall remain over to J. N. and his heirs, or to J. N. and the heirs of his body; that shall not abridge, qualify, or restrain the preceding devise, or make the estate tail conditional, but inasmuch as there will remain a further estate or interest by way of remainder, to be disposed of,

to

to take effect on the determination of the estate tail, such words will be construed as a conditional disposition of such remainder, that is a disposition, by which if J. S. dies living A. at the time of his death, J. N. will become intitled to such remainder, but if J. S. leave issue at the time of his death, and that issue happens several years afterwards to fail, then J. N. will have no title to such remainder, but it will be undisposed of by the will, and consequently will descend to the heir at law. And in the mean time both the first estate tail, and the remainder will be liable to be barred by a recovery suffered by J. S.

So although the policy of the law of England ^{3 Cr. 547, 48.} will not permit a freehold in land to be limited to commence at a future time by any conveyance *inter vivos* upon a principle now grown obsolete; yet, for the reasons before suggested, and in similar circumstances, it admits the limitation of a future interest without a preceding estate to support it, (*i. e.*) a future interest unsupported by any preceding freehold. As if one devise to the heir of J. S. after the death of J. S. this is good as an executors devise. So A. devise lands to B. in fee, to commence and take effect six months after the testator's death. Of the same nature is a devise of his lands to be sold by his executors

¹ Salk. 226.

Clarke v. Smith,
² Lutw. 798.

tors if his heir fails of payment of such a sum at such a day.

**Haynsworth
vers. Pretty,
Cro. Eliz. 833,
919.
Supra 253, 254.**

Again, where one had issue four sons and a daughter, and devised to his younger sons and daughter legacies of 20*l.* to be paid by his eldest son, and devised his land to his eldest son in fee, upon condition, that, if he paid not these legacies, his land should be to his younger sons and daughter and their heirs ; it was resolved, that the first devise to the son and his heirs in fee, being no more than what the law gave, was void ; and that it was but a future devise to the second son and daughter upon the eldest son's default of payment.

**Pay's case,
Cro. Eliz. 878.**

So where one devised his land to J. S. from Michaelmas following for five years, remainder over to P. and his heirs, and died before Michaelmas ; this was held good by way of executory devise.

There is also another kind of devise, which is called a conditional limitation.

This species of devise takes effect in two instances.

First, Where an estate is devised to one for life, remainder to another in tail, remainder to another

another in fee, upon condition that tenant for life, or in tail in remainder, shall do or omit doing a certain act. Secondly, Where a particular estate is devised to the heir at law of the testator, with remainders over, upon condition that the heir at law shall do or omit doing some particular act: In these cases the limitation to the particular tenant does not operate as a condition of which the heir may take advantage, but as a limitation to determine the particular estate.

This mode of construction upon limitations was adopted by courts of law in order to give effect to the intent of the testator, where it could not have operated had the strict legal construction upon such words prevailed; for, it being a maxim at the common law, that none can enter for a condition broken but the person from whom the condition moves, *i. e.* the grantor or donor, or his heir; and the consequence of the grantor's or donor's, &c. taking advantage of a condition, by entry or claim, being a defeazance of the livery made upon the creation of the estate, and consequently of all estates as well in possession as in remainder depending upon that livery, the donor or his heir being, by such entry, in of the same estate as he had before the condition and the estates depending thereupon were created,

the estates in remainder, limited by devise in the first instance after such estate on condition to a stranger, not the heir at law, would, by the entry of the heir of the devisor (and he alone could enter in cases of strict conditions) have been utterly void.

But, where a devisor in the limitations in his will uses such conditional words, and proceeds further to limit other estates over on breach of the condition, it clearly is not his intent, that the subsequent estates limited should be defeated in consequence of that act, which he means should give life to them. Now it is a maxim of law, that the words of every man, expressed in his will, shall be taken and expounded according to his intent and meaning; therefore in these cases, the penalty inflicted (namely, the forfeiture of the estate of such tenant on condition) is not considered as a condition to defeat all the other estates, when it appears to be the intent of the party that the whole estate is not to be defeated, but the devise is taken as in nature of a limitation, that is, as if it were to the particular tenant until he break the condition, and when he does any act to break the condition, then his estate to end by act of law. So that, after the act done, the estate of the tenant on condition shall cease and be dissolved, in like manner as where land is given to a man

as long as J. S. shall have issue of his body or until J. S. die without issue of his body, remainder over; in which cases, if J. S. die without issue, the land and the freehold in law will be presently in the remainder man, so that he has the possession in law before entry. And this construction is well warranted as to wills, the rule being, that where the intent is shewn by words and they are not aptly put, there, such sense ought to be put upon the words as is suitable to the intent; and therefore, as, in sense, such words clearly design limitations, they shall import them in devises, where the intent only is regarded, and the words, although not apt in law for the matter, are drawn to the intent.

And in instances of the second kind, viz. where the estate subjected to the condition is given to the heir at law, it is the intent of the deviser that he shall do or be restrained from doing that, which is the subject matter of the condition. But if, in such case, it were taken to be a condition, and that there were no other penalty for the breach of it but entry only, then if the heir, himself, did the act or thing forbid, or omitted doing the act or thing required, the condition would be thereby extinct; for the title of the condition passes with the land, so that he cannot enter for the condition broken by himself contrary to his

own act ; now this would be inconsistent with the intent of the devisor, who means that the heir should be restrained to do or from doing the act subjecting his estate to the penalty ; and therefore to the end that the intent of the devisor may be effected, it shall not be a condition, but the law annexes another penalty to the heir, which is greater to him than a condition carries along with it, if he comply not with the intent of the devisor.

Art. 424.

And therefore wherever there is a limitation with remainder over, made in the words of a condition, which would be construed as a condition if it could take effect as such, there it ought to be construed as a limitation if it cannot.

Scholastica's
case, Plowd.
408.

Thus it was held, in an instance of the first kind, viz. where A. devised land to his son in tail, remainder to another of his sons in tail, remainder to S. his daughter in tail, with divers remainders over to others of his own name ; with a clause, that if *any* of the tenants in tail aliened, sold, wasted, mortgaged, or discontinued the same estates, that then he or they should be utterly excluded from any benefit of the devise thereof to him or them, and the estate should immediately come to the party next in tail ; that this clause of restraint in the will was not a condition requiring

requiring a re-entry, but a conditional limitation which utterly dissolved and determined the estate.

And where an estate is to remain over for breach of a condition, and the same is devised by express words of condition; yet it will be intended a limitation.

Thus if a man have issue two sons, R. the elder, and H. the younger, and also two daughters, and devise certain lands to H. in tail when he shall come to twenty-four years of age, *upon condition* that he shall pay to his two daughters 20*l.* a year at their full age, and, if the said H. die before twenty-four, then wills that R. his son and heir shall have the same lands to him and to his heirs, he giving and paying unto his said daughters the said money in such manner as H. should have done if he had lived; and if his sons H. and R. (if the said lands come to the said R. by the death of H.) do not pay the said money to his daughters aforesaid, then wills that his said lands shall remain unto his daughters and their heirs for ever: This is a limitation on the estate of H. and not a condition, so that if H. pay not the sums to the two daughters after his age of twenty-four years and at the full age of the daughters, R. shall have this by way of

Wiseman verf.
Baldwin,
1 Roll Abr.
411, 5.
Lady Fry's
case, 1 Vent.
202, 321, 322.
Page verf.
Hayward,
11 Mod. 61.
2 Salk. 570.
vid. Cont. Lady
Portington's
case, 10 Rep.
Thomas's case,
1 Roll. Abr.
411. Skirme
verf. Bond,
1 Roll Abr.
412. but these
cases now
over-ruled.

limitation, and cannot enter as for a condition broken, because otherwise, *ex gratia*, if this were a condition, it would defeat the portions given to the daughters and the future devise to them, which would be against the evident intent of the devisor.

And such a conditional limitation will be good to introduce an executory or springing devise after a fee,

Fulmerston
vers. Steward,
Cro. Ja 592.
Dyer 23. 2.
Cro. Eliz. 359.
1 Eq. Ca. Abr.
187. Et vid.
infra 264. A-
velyn. Ward.

As if A. devise to B. and C. his wife, daughter and heir of the said A. lands in C. to them and the heirs of B. *upon condition* that they shall assure lands in such places to his executors and their heirs to perform his will; and if they fail, then devise his said lands to his executors and their heirs. This is a good limitation, and no condition; for, if it were a condition, it would be destroyed by the descent to the heir.

Supra 260.

An instance of the second kind, viz. where the estate on condition is devised to the heir, occurred likewise in *Scholastica's case* above-mentioned; for the court said that the donee and heir, who was first in the tail, was intended to be restrained from discontinuing and barring his entail by feoffment, &c. as well as any of the others; but he could not enter for the condition broken.

broken by himself contrary to his own feoffment; which was contrary to the intent of the devisor, who meant that he should be restrained as well as the others.

Again, in the case of *Wellocke and Hammond*, where the condition operated actively the donee being required to do an act, the legal consequence was held to be the same.

In this case a copyholder in fee of land descendable in Borough English, having three sons and one daughter, devised his land to his eldest son, paying to his daughter and to each of his other sons 40 s. within two years after his death. The devisor made a surrender according to the custom of the manor, and then died. The eldest son was admitted, and did not pay the money within two years. The youngest son then entered into the land: and one point adjudged was, that the word Paying, here, made a limitation and not a condition; for, if it were a condition, it would be void and to no purpose, because it would descend to him that was heir to the condition, and so be extinct, and then there would be no remedy, and therefore the law would construe it a limitation of his estate, viz. that it should cease if he did not pay it, and go over to the heir in Borough English.

*Wellocke vers.
Hammond,
Croke Eliz.
204.
S C. 3 Rep. 21.
Nota, condi-
tion, when
estate in
Borough Eng-
lish, descends
to heir at com-
mon law.*

Avelyn verf.
Ward, 2 Vez.
420. et vid.
Rundal verf.
Ely, Carter,
71, 171.

So where A. devised his real estate to his brother B. and his heirs, on this express condition, that, within three months after his decease, he should execute and deliver a general release to his trustee; but if his brother should neglect to give such release, then he devised it to B. his heirs and assigns for ever; the devisee was held, by Lord *Hardwicke*, to take by way of a conditional limitation.

Supra 263.

But words; that are *clearly* words of condition, are, only for the purpose of effecting the *manifest* intent of the testator, construed as words of limitation; upon which principle alone the case of *Wellocke* and *Hammond*, before cited, which is the leading case on this head, was determined. Therefore if such does not appear to be the testator's intention, that is, if it be not a necessary construction to give effect to the other parts of his devise; or, if there be other parts of the devise, from which it may be fairly concluded that this could not be the testator's meaning, the court cannot imply that which clearly appears not to have been the testator's intention.; and therefore, in case of an estate tail, the law will not raise this implication to prejudice the issue in tail, who are the first objects of the testator's bounty, in favour of a remainder man, who is only a secondary object; because, though a condition

Quære et vid.
Scholastica's
case.

dition when annexed to an estate in fee is meant to be compulsory, yet, when annexed to an estate tail, it cannot be so meant; but must be intended merely as an intimation of the testator's wishes; for, the donee may bar the estate tail, and the condition will perish with it.

Thus where W. devised his estate unto D. W. for life, remainder unto S. and the heirs male of his body lawfully begotten, and the heirs male of their bodies lawfully begotten; and, for the want of such issue, to the heirs male of the body of D. W. and the heirs male, &c. and, for want of such issue, remainder over. Provided always and upon the express condition, that the persons upon whom the estate should descend and come did, and then should, change their names and take the testator's. And he did also declare, that his several devises of his said estates were likewise on the express condition, that no person should plow or commit any waste on the premisses, &c. by felling trees, (unless for necessary repairs) or otherwise; but should forfeit the premisses and ground upon which the tree should be so fallen, or on which such waste should be committed, to the person who should be next intitled to the premisses according to this will. And then followed a devise of the places wasted to the persons next in remainder. The testator died,

leaving

Gulliver vers.
Ashby,
Blackst. Rep.
607. S. C. 4.
Burr. 1929.
et vid. Ruddall
vers. Milward,
best reported
Saville 76.
S. C. Moore
212.

leaving D. W. and his nephew S. his heirs at law. D. W. afterwards, entered and died; then S. entered, and held the estate for about three years, and then suffered a recovery, and aliened it, but never changed his surname, nor took the name of the testator. Afterwards one of the subsequent remainder men in tail entered on the alienee of S. for a breach of the proviso, by S. not changing his surname as required by the testator. And one question was, Whether the taking the name was a condition subsequent, of which the heir might take advantage, or a conditional limitation, the breach of which divested the estate. *Et per curiam* unanimously; This was not a conditional limitation. It was clearly not an express limitation; and an implication of one could only be made in order to effectuate the testator's intention, and must be a necessary implication to that purpose. Now here it was not so, nor should such an implication be made upon a limitation after estates tail.

Supra 260, 262,
265. Saville 76.

Supra 265.

It is necessary here to observe the distinction between the above case and that of *Ruddal* and *Milward* and *Scholaftica*'s case, both of which, at first view, the case of *Gulliver* and *Ashby* seems to contradict: but, in *Scholaftica*'s case, there was a devise over to the next person in tail, by express words, in case the condition were broken.

Whereas,

Whereas, in the cases of *Gulliver* and *Ashby*, and *Ruddal* and *Milward*, there was no devise over in case the conditions were broken; and, in that of *Gulliver* and *Ashby*, there was likewise in the very next clause a devise over in case of breach of the condition of not committing waste; from whence it was clear, that the testator conceived that the mere breach of the condition would not occasion the estate to go to the remainder man; for, then, the whole estate would have passed to him by operation of law, and the testator's meaning was, that only the place wasted should pass.

The next kind of estates or interests, of which I shall speak, are contingent remainders; and, as to them, I shall use Mr. Fearn's own words, as, of all others, best adapted to convey a clear conception of their nature and kinds.

"Contingent remainders," says he, "are of four sorts: First, when the determination of the preceding estate itself depends on an event which may never happen, as if A. make a feoffment to the use of B. till C. returns from *Rome*, and after such return of C. then to remain over in fee; here the particular estate is limited to determine on the return of C. an event which possibly may never happen;

Fearn's Com.
Rem. 4

" pen ; and, therefore the remainder, which
 " depends on such contingent determination of
 " the preceding estate, is dubious and con-
 " tingent.

Itid.

" Secondly. When some uncertain event, un-
 " connected with, and collateral to the deter-
 " mination of the preceding estate, is, by the
 " nature of the limitation, to precede the re-
 " mainder. As if a lease be made to A. for
 " life, remainder to B. for life, *and if B. die*
" before A. remainder to C. for life ; here the
 " event of B.'s dying before A. does not in
 " the least affect the determination of the par-
 " ticular estate, nevertheless it must precede
 " and give effect to C.'s remainder ; but such
 " event is dubious, it may or may not hap-
 " pen, and the remainder depending on it is
 " therefore contingent.

Brid.

" Thirdly. Where a remainder is limited to
 " take effect upon an event, which, though it cer-
 " tainly must happen some time or other, yet
 " may not happen till after the determination
 " of the particular estate. As if a devise be
 " made to J. S. for life, and after the death of
 " J. D. the lands to remain to another in fee ;
 " now it is certain that J. D. must die some
 " time or other, but his death may not hap-

" pen till after the determination of the particu-
 " lar estate by the death of J. S. and there-
 " fore such remainder is contingent.

" Fourthly. Where a remainder is limited Ibid.
 " to a person not ascertained, or not in being
 " at the time when such limitation is made. As
 " if a devise be made to one for life, remain-
 " der to the right heirs of J. S. or if a remain-
 " der be limited to the first son of B. who has
 " no son then born. In the former case there
 " can be no such person as the right heir of
 " J. S. until the death of J. S.; and, in the lat-
 " ter case, B. may never have a son; or, if ei-
 " ther event should happen, viz. the death of
 " J. S. or B.'s having a son, still the particular
 " estate may determine previous thereto; in
 " which cases the remainders would be void.
 " They are therefore contingent.

" But the uncertainty whether an estate shall Ibid 147.
 " ever vest in possession or not, does not make
 " it contingent; for, wherever there is a parti-
 " cular estate, the determination of which does
 " not depend on any uncertain event, and a
 " remainder is thereon absolutely limited to a
 " person in *esse*, in that case, notwithstanding
 " the nature and duration of the estate limited
 " in remainder be such, that it may not endure
 " beyond

" beyond the particular estate; and therefore,
 " may never take effect or vest in possession;
 " yet it is not a contingent but a vested remain-
 " der. As if a lease be to A. for life, re-
 " mainder to B. for life or in tail; here, not-
 "withstanding B. may possibly die, or die with-
 "out issue in the life-time of A. and conse-
 "quently never come into possession, yet is his
 " remainder a vested interest.

Ibid.

" It is not the uncertainty of ever taking ef-
 "fect in possession that makes a remainder con-
 "tingent; for, to that every remainder for life or
 "in tail is and must be liable, as the remainder
 " man may die, or die without issue, before the
 " death of tenant for life. The present capa-
 "city of taking effect in possession, if the pos-
 "session were to become vacant, and not the
 "certainty that the possession will become va-
 "cant before the estate limited in remainder
 " determines, *universally* distinguishes a vested
 "remainder from one that is contingent."

Estates, created by devise, may be either legal or equitable.

Legal. As by devise of lands, or of an use
 since the statute for transferring uses into pos-
 session.

Equitable.

Equitable. As, first, by devise of an use before the statute for transferring uses into possession.

Secondly. By devise of a trust in equity.

First. By devise of an use ; and it is clear, that an use might have been devised previous to the statute of uses.

Fitzh. Dev. 22,
30 Hen. 6.

As a devise of land supposes a consideration, it will lodge both the land and use in the devisee, if no use be limited upon it ; and it cannot be averred to be to any other use than to the use of the devisee ; for that would be an averment contrary to the design of the will appearing in the words of it.

Nota. In this sense the statutes of wills are said to execute the legal estate and the use. Vide more on this head infra.

4 Rep. 4.

But if an use be expressed, it will enure to the use of *cestui que use* and will execute ; for a devise only has an implied use, when no other is limited, and *expressum facit cessare tacitum*.

2 Vent. 312.

Thus where H. seised of lands held by knights service, devised two parts of them to D. and his heirs to the use of T. his brother and his wife, and afterwards to the use of the said T. and his heirs males : it was agreed that a devise might be to the use of another.

Hartop's case,
Trin. 33 Eliz.
1 Leon. 253, et
vid. Moore
107.

Popham 4.
30 Hen. 6.
Fitzh. Dev. 22.

So it is said, (34 and 35 Eliz.) that, if a man devise lands to another in fee, he hath the use and title of it; but if it be limited to his use for his life only, the use of the fee shall be to the heir of the devisor; for, by the limitation his intent shall be taken to be otherwise than it would have been taken if this limitation had not been.

2 L. Raym. 875.

Vid. Co. Litt.
last edit. 277,
278, in note.
Siderf. 26.

And the better opinion seems to be, that a use so devised will be executed by the statute of 27th Hen. VIII. of uses. Those, who entertain the contrary opinion, contend, that, as the statute of uses preceded the statute of wills, it could not extend to estates, created under a power that had no existence until the latter statute imparted it; for although it be true that the statute of uses speaks of persons seised to uses *by virtue of wills*, yet this must have applied to lands which were devisable by custom; as where a person, seised of lands devisable by custom, devised them to A. and his heirs to the use of B. and his heirs: or to uses at common law; as where a feoffment was made to A. and his heirs to the use of B. and his heirs, and B. devised the use. To uses of this description it is admitted the statute extended, but it is said to be difficult to conceive how uses, created under the testamentary power given by the statute

tute of wills, can be within the statute of uses.

But if we consider that the statute of uses was a remedial law, made to remove the many frauds and inconveniences that were incident to uses in the shape they assumed at that time, it seems by no means difficult to conceive that the benefit of it should, in construction, be extended to subjects not in existence at the time of the making of it, but which were, when introduced, obnoxious to similar mischiefs.

It is perfectly clear, from the provisions therein respecting uses created by will, that the legislature had *that* species of use in its consideration, and was of opinion, that it was equally open to objection as those created in any other manner.

The thing then, respecting which this question arises, viz. uses created by wills, did exist at the time when the statute of uses was enacted, and was amongst those instances to which the remedies applied by the statute were pointed; the only question then seems to be, whether a statute made touching a certain thing may not be extended to another thing of the same nature,

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and in the same degree of mischief, though not existing until afterwards? Now instances of this kind are by no means unfrequent in our books.

Ex gratia. The statute of *Marlebridge*, cap. 6. which was made *anno 52*, Hen. III. gave the wardship of the heir of the tenant who held by knights service, notwithstanding a feoffment made by collusion to the lord, at which time the heir of *cestui que* use was not in ward: but when the 4th Hen. VII. cap. 17. enacted two hundred years and more after, gave the wardship of the heir of *cestui que* use, it was held, that if *cestui que* use, after the statute 4 Hen. VII. made a feoffment in fee by collusion to defraud the lord of his ward, it should be taken within the equity of the statute of *Marlbridge*: also the statute *de donis conditionalibus* made the 13th Edw. I. by which estates tail were created, all estates of inheritance having been before fees-simple, is, as to the warranty of tenant in tail without assets, taken to be within the *equity* of the statute of *Gloucester*, cap. 3. made *anno 6th Edw. I.* And it is ordained by the statute of *Aston Burnel*, cap. 2. that if the appraisers of the goods of him that is bound in a statute merchant appraise them too high in favour of the debtor and to the damage of the creditor, the thing appraised shall be delivered to them at the price they put upon it,

4 Rep. 4.

12 Hen. 7.

19, 20. vid.

quæ et vid.

2 Inst. 322,

323.

27 H. 8. 9 a. b.

Co. Litt. 365 a.

Plowd. 127.

Ibid, 11 Edw. I.

it, and they shall presently answer the creditor his debt. Now, at this time, the conusees could not have execution of the land of the conusor, but that was afterwards ordained by the statute *de Mercatoribus*, which enacted, that the lands of the conusor should be delivered to the merchant by reasonable extent, and did not say, that if they were extended too high, they should be delivered to the extenders, yet it was taken by the equity of the statute of *Aeton Burnel*, notwithstanding it was a penal statute, that they should be delivered to the extenders, if they extended them too high. So the statute of *Glocester* cap. II. as to termors, who were, previous thereto, subject to the pleasure of those that had the freehold, who might oust them by recovery suffered in a real action though by collusion, was held to extend to tenant by statute merchant, or staple, or elegit, which executions against lands were given by acts of parliament made afterwards; yet, these being in equal mischief, though they were created after the statute of *Glocester*, were held to be within the remedy of that act, they being but termors: And *Magna Charta*, cap. 21. which states who shall be exempt from furnishing *purveyance* carriages for the king, was held, under the word *Domini*, to extend to all degrees and orders of the lesser and greater nobility or dignity; as of knighthood, dukes,

13 Edw. I. stat.
3.

2 Inst. 35.

marquisses, earls, viscounts, and barons, although there were no dukes, marquisses, or viscounts within *England* at the making of this statute.

If, then, it be not unusual for statutes of later date to be controlled by and to be construed within the equity of the statutes of elder date, surely our law books furnish no instance in which courts would be more anxious to avail themselves of that doctrine, than the case now under consideration; for it was plain that the legislature meant that uses under devises by custom should be governed by that statute, from the express words of it, and uses under devises by statute were in equal degree of mischief.

4 Rep. 4. a b.

But this point seems to have been decided in *Vernon's* case. For, at common law, no acceptance of a collateral recompence would bar a wife of her dower. The statute of 27 Hen. VIII. made a jointure to be a bar, which, at that time, extended only to a jointure made by act executed in the husband's life-time: but it was held, in this case, that if a man were to devise lands to his wife, after the enabling statutes of the 32d and 34th Hen. VIII. of wills, expressly in satisfaction of her dower, and she should accept them, this would be a bar within the 27th Hen. VIII. because it is within the same equity and reason, and the

the diversity is in the manner only, not in the thing,

And that such has uniformly been the construction on these statutes, is evinced by the following cases.

A. seised of lands in fee, devised them to trustees and their heirs to permit A. to receive the rents and profits for his life, and, after, that the trustees should stand seised of them to the use of the heirs of the body of A. with a proviso that A. with the consent of his trustees might make a jointure for his wife. And it was adjudged, *per Holt*, Chief Justice, that this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the statute, which mentions the word Trust as well as Use.

Broughton v.
Langley, Salk.
679. S.C. 2 L.
Raym. 873.
1 Lutw. 523.

So, in the case of *Popham* and *Bamfield*, which was (as to this purpose) a devise to A. in trust for the use and benefit of B. it was insisted on the one side and agreed on the other, that the estate was executed in B. by the statute of uses, the words being in trust for the use and benefit of the devisee.

Popham v.
Bamfield,
1 E. Ca. 108.
1 Vern. 79a
167.

Vid. note Co.
Litt. 277 b.
et. Sid. 26.

Mr. Butler, in his excellent note upon conveyances, has furnished us with the arguments, used on this occasion, against the statute's operating in these cases, but has not given his opinion *decisively* on the subject. Among other observations, it is there suggested, that as, by a devise to A. and his heirs to the use of B. and his heirs, the testator shews it to be his intention that B. should have the legal fee, the law will put that construction on the devise, and give it that operation.

It is difficult to conceive upon what grounds a conclusion, that such is the intent of the testator can be drawn from a limitation of this nature in a devise. The presumption seems to me to be the other way. Why should we conclude that a testator in giving an estate to A. and his heirs to the use of B. and his heirs, intends B. the legal fee, any more than we should in case a testator gave his estate to A. and his heirs to the use of B. and his heirs to the use of C. and his heirs; and yet the operations of these limitations will be different; the former will execute, the latter will not: But if the intention governed and were the same in both cases, (and there is no reason to conclude that it was otherwise, because there could be no reason to insert trustees

trustees in the first case, unless thereby it was meant to prevent the legal estate from passing, any more than in the last,) then, if the statute of devises executed the use by its own efficacy, independent of the statute of uses, both these estates would be executed; or, on the other hand, if, as seems the more reasonable conclusion, the interposition of trustees to uses was meant in both cases to prevent the legal estate from passing, then the statute of devises would in both cases give effect to these limitations as trusts. But the truth is, that an use limited upon an use by devise is not executed, whereas a mere use is.

It is likewise said, that it depends upon the will of the testator, whether the statute of uses shall or shall not operate upon the devises in his will; that, therefore, were a devise made to the use of A. for life with remainders over, if it were to be considered as a limitation under the statute of uses, it would be void for want of a seisin to serve the uses; that it cannot, therefore, be the intention of the testator that it shall operate under that statute; consequently, the law will not force it under that statute, but will leave it solely to its effect under the statute of wills. But that, suppose a devise were to A. and his heirs, to the use of B. and his heirs, that would be good to

*Quære et vid.
Jenkins v.
Younge,
3 Cro. 230.*

give the legal fee to B. as a limitation under the statute of uses. That the testator, therefore, *might* intend, and the form of the devise *therefore* does intend, to raise an use under that statute, and the law, in conformity to his intention, extends its operation to the devise. But the true ground upon which the former example stands, is, that, in a devise, technical expression is unnecessary. The intention to give to A. for life is clear, and then the form of giving, though it be by words that seem to refer to the mode of *use*, will not overturn the intention; or, to put it in another way, there being no trustee in whom there may be a seisin to serve the use, the statute of uses cannot attach upon the limitation. And the answer to the latter case is, that the intent cannot operate on the statute; for, if it might extend, it might also contract its operation. Suppose then the testator had declared, or made such a will as raised the necessary implication, that his intent was to create an use at common law but that the use when created should not execute, such use would, notwithstanding, have been executed. Thus, in the case of *Boughton and Langley*, the devisee in trust and his heirs had the land devised to him, in trust to permit A. to receive the rents and profits, and, after that, to stand seized to the use, &c. with a proviso, that the trustees and the said A. might make a jointure to his wife.

Vid. 1 R. Ab.
b. II. K. P.
22.

No

No words could furnish a stronger ground to infer an intention that the trustees should be seised of the legal estate; for, if the *cestui que* trust were seised of it, there would have been no occasion for the devisee in trust to have permitted A. to have received the rents and profits; besides, the power's being made to depend upon the consent and concurrence of the trustees, and their being required to join in the executing it, and consequently in the conveyance for that purpose, was a *clear* evidence of the testator's intention, that the estate should remain in them, and, consequently, that the testator did not intend A. the legal estate: yet this was held to be an *use* executed.

As the intent of the testator cannot contract, so neither can it extend the operation of the statute of uses, or give to a devise an operation by way of an *use* that the statute of uses will not effect; for, if A. devise to B. to the *use* of C. in trust for D. in order that, by virtue of the statute of uses or devises, the estate may be executed in D. and his wife be intitled to dower at common law, no one will say that D. will thereby be in possession of the legal estate, executed in him by the statute either of uses or devises.

Then

Then it is not the intention of the testator that governs the application of the statute of uses; and, if that be not the principle upon which the operation of the statute depends, then it must rest upon the foundation of its own efficacy, considered as a great political regulation, attaching upon all the property in the kingdom so circumstanced as, from its situation, to be exposed to the mischiefs it was the object of this law to redress.

Secondly. Through the medium of a trust.

Trusts may be distinguished into, Trusts executed by the statute of uses, and, Trusts retained in Chancery notwithstanding the statute.

The distinction between a use, trust, or confidence executed by the statute of the 27th Hen. VIII. (for all these terms are used to describe the beneficial interest meant to be operated upon by the statute,) and mere trusts executory, or trusts not executed by the statute, is, that, in the former case, by the words of the statute, which are, " that any person who shall have any such use, &c. shall from thenceforth stand and be seised, &c. of such lands, &c. to all intents, constructions, and purposes in the law, *of* and " *in*

"in such like estates as they had or should have
 "in use or confidence of or in the same." By
 the force of which words the legal estate is exe-
 cuted, *i. e.* transferred to the use, and the *cestui
 que* use has the legal estate in him, in the same
 degree as before he had the use; the conse-
 quence of which is, that, as to persons in *esse*,
 the legal estate becomes vested immediately,
 and as to persons not in *esse*, it becomes vested
 in them immediately as they come in *esse*, pro-
 vided they come in *esse* in good time, and if they
 do not, then the estate goes over to the next
 remainder man in like manner as it would do
 in case of a common law fee: Whereas, in the
 latter case, viz. of a trust retained in equity, the le-
 gal estate still remains in the trustee, to serve and
 support the trust according to the manner in
 which it is limited and the intent of the donor.

The first idea of reviving uses under the de-
 scription of executory trusts was conceived soon
 after the statute was passed, and arose from the fol-
 lowing circumstances. It having been held, that
 if one, after the statute of uses, by deed indented
 and inrolled, or, before the statute, by deed, had
 bargained and sold his land to another in fee to
 the use of the bargainee for life, &c. or in fee
 to the use of a stranger, such use limited over
 was void; because the nature of the trans-

¹ Anderson
37. Bro. 340.

action

Dyer 155.

action and the price paid implied therein an use to the vendee viz. the first *cestui que* use, and therefore the limitation over to the use of another was repugnant; for, thereby, the use in fee, which was in the bargainee in respect of the consideration, would be taken out of him and carried over to another without a consideration; it became therefore a maxim in law, that a use or trust could not be limited out of an use or trust before limited. When this maxim was established, therefore, there was no idea that a second use or trust could have any effect; but if it were an use, trust, or confidence, it was executed by the statute; and where it was declared to be, there it must rest, for that statute operated no further. If it were not executed it was a nullity, it was void. Therefore on a limitation to A. and his heirs, to the use of B. and his heirs, *in trust for* D.—B.'s estate was held to be executed by the statute, and D. took nothing. But although courts of law strictly adhered to this maxim, and sturdily refused to extend the operation of the statute of the 27th Hen. VIII. beyond the first use, courts of equity were not so rigid; but, on the contrary, seized with avidity this opportunity given them by courts of law to re-establish their jurisdiction over property, by giving effect to these uses or trusts, as affecting the conscience, and so the proper subject

subject of the jurisdiction of courts of equity.

Therefore wherever an use or trust arises out of land, there the use will be executed by the statute, and the legal estate vested; but where the use arises out of a preceding use which arises out of land, there the statute will not attach, and the use is retained by equity, only, under the denomination of a trust.

Afterwards other species of trusts were considered as out of the statute; namely, such as, in order to effect the intent of the creator of the trust, required that the *legal* estate should remain in the trustees, and not execute in the *restique* trust. As where lands are given to one and his heirs in trust to receive and pay over the profits to certain persons in such manner as cannot be effected if the estate passes out of the trustee.

Jones and Lord
Say and Seal,
1 Eq. Ca. Abr.
383.

So where a devise is to trustees and their heirs, to the use of them and their heirs, upon trust for S. for life, and after his decease in trust for his first and other sons and the heirs males of their bodies, and for want of such issue, &c. with a proviso, that none of the persons to whom the estate is thereby limited shall be in actual possession of the whole or any part thereof till he

Hopkins v.
Hopkins,
1 Atk. 581.
Robinson v.
Comyns, Rep.
T. Talbot 164.

he or they respectively attain his or their age or ages of twenty-one; and in the mean time the trustees to make an handsome allowance for the education of such persons, and the overplus to go to such as shall be intitled thereto. Here is an intention plainly declared, that the trustees shall continue in possession of the estate and receipt of the rents, till one to whom an estate for life is limited shall be twenty-one, and the trustees in the mean time are to make an handsome allowance for his education out of the rents; and after the age of twenty-one, such person is to have the possession; that is, the estate is *then* to be conveyed to him.

Bush v. Allen,
5 Mod. 63.

So where a man devised to J. S. the wife of J. S. the issues and profits of certain lands, *to be paid by his executors*; this was held, by *Rokeby* and *Eyre* to be a trust for the wife; for, if it were otherwise, the husband should intermeddle when the devisor intended to exclude him.

The before-mentioned kind of uses are not executed by the statute, because the legal estate in the land must remain in the trustee, to enable him to perform the trust.

A still further distinction has been taken as to equitable trusts, upon the circumstance of a conveyance

veyance being directed to be made by the trustees, or not ; for where the trustees have been directed, by the instrument creating the trust, to execute a conveyance of the legal estate, they have been deemed executory trusts, as in the case of *Hopkins* and *Hopkins* before mentioned ; but where no further or other conveyance is directed to be made by the trustees, but the trust is left on the declaration or limitation in the original instrument, to take effect as that operates in legal construction, these have been deemed trusts executed, not by the statute but by the party creating them, they requiring no further conveyance to give them effect.

And although Lord *Hardwicke*, in the case of *Bagshaw and Spencer*, said that if the question had come recently before him, he should then have thought that there was little weight in this distinction ; because all trusts were executory, and, whether a conveyance were directed by the instrument creating the trust or not, the Court of Chancery must decree one when required at a proper time ; yet his Lordship, in the case of *Exel and Wallace*, said that he should have that deference for his predecessors as not to lay this distinction out of the case ; not intending to say that what all his predecessors had done was wrong founded.

A trust of an advowson may be devised.

Thus where A. being patron and incumbent of S. devised the perpetual advowson of S. to trustees, upon trust in the first place to present his son W. if living, and then directed that, after the church should next after his death be full of an incumbent, then they should sell the perpetuity of it, and apply the profits to the payment of his debts, and for his daughters fortunes. It was held that this was a good devise in trust of the residue.

And a mere claim, in equity, to an interest in the trust of an hereditament is devisable.

Thus where W. M. seised of the king's moiety in the New River water in fee, consisting of thirty-six shares, conveyed the same to H. M. and others, upon trust for himself and his wife during their respective lives, and then that the trustees, out of the rents and profits of the premisses, should pay his debts and portions for his daughters at certain days, and, after such debts and portions paid, permit H. M. heir of W. M. and his heirs, to take and receive the rents and profits of the premisses. W. M. and his lady died. H. M. in June 1757, contracted with W. B. former husband of F. B. for sale to him of fourteen shares of the king's moiety for £.7,000, of which £. 250 was to be paid down, and the rest ad-

Cornbury v.
Middleton,
1 Ch. Ca. 1733,
208.

vanced

vanced as the parties should agree. Afterwards, the contract not being performed, B. exhibited his bill against H.M. to enforce the execution of the agreement ; after various proceedings had in the suit B. died, having first devised the benefit of his contract to C. and her heirs. And on a bill filed by C. it was insisted, that the plaintiff C. had no title to have the benefit of the agreement with B.; for, that the breach of an agreement, which was a thing in action, was not devisable. *Sed per Wyld and Rainsford*, Justices, the Master of the Rolls, and the Lord Keeper, against the opinion of *Wyndham*, Justice. This was a case of equity and conscience, and the court was to help that side that had conscience. It arose upon a trust, and was an equitable interest, and an interest in a trust was in equity assignable or *devisable*.

Another trust devisable, not executed by the statute of uses, is, where one, seised in fee, raises a term for years and limits it in trust for A. &c.; for this the statute will not execute, the termor not being *seised*.

The power of devising extends not only to the several actual legal estates or interests in things real and personal before mentioned, but also to authorities over such estates or things.

U

Thus,

Dyer 36 b.
Pl. 170.
S. C. Cro. Eliz.
678, 734.
Note per Popk.
If the de-
visor had been
that he should
make a feoff-
ment or lease
for life, this
had been an in-
terest in the de-
visee; because
otherwise he
could not make
livery.

Carpenter v.
Collins, Cro.
Eliz. 774.
S. C. Yelv. 73.
Brownl. 88.

Thus a man may devise, that J. S. shall have the disposing, selling, letting, and ordering of his lands, and this will be good to give the devisee a power to direct the management of them, and to lease them at will: but will not warrant a sale by him, or lease for a term of years; for he has no interest, but only an authority.

And the law is the same as to a devise that his son shall have his land when he shall arrive at twenty-four, and his daughter to have a portion of £. 40 at twenty-two, and that his executors shall have the oversight and dealing of all his lands and goods until his children come to that age. The executor may lease the lands at will; but, if the son die before twenty-four, the authority of the executor is determined, and the daughter, as heir, may enter on the lessee, and determine his estate; for, her age is mentioned only to ascertain the receipt of her legacy, and not for any other purpose.

Helev. Greene,
2 Roll. Ab.
261. Pl. 10.

But where a man, possessed of a manor for ninety-nine years, made his will and devised it to A. his wife for her life, "to set, let, or make estates out of it, and them in as ample manner as be himself might if he were living, during the said term of her life;" and after the death of A. the testator devised the same to B. his son,

son, and to the heirs of his body engendered, and died: and A. being made executor, consented to the legacy, and, afterwards, made a lease of one tenement parcel of the said manor to C. for ninety-nine years if three lives so long lived, and then A. died; although it was objected that by this clause A. had only a power to dispose of it during her life, as otherwise she might destroy the remainder limited to the son, yet this was held to be a good lease against him; for, if this did not give her power to make leases to continue after her death, the clause would be merely void and idle; therefore, the words *set*, *let*, and *make* estates should be intended according to the custom of the country in *Somersetshire*, which, this being a manor, was to make leases for lives or years, and the testator trusted his wife to dispose hereof in such manner, that his son should have the possibility of it after the estate run out.

Authorities to executors to sell were frequent before the statutes of devises. And although generally it be of the nature of an authority to determine by the death of the party who gives it, yet, where given by devise, it is held good for necessity, and because it is supported by the special direction and intention of the party who

Styles 291.

39 Aff. P. 3, 17.

Perk. Sec. 541.

9 Rep. 77.

38 Aff. Pl. 5.

gives the authority by his will (that takes effect after his death) and who is dead.

Townsend v.
Walley,
Cro. Eliz. 341.

And one point agitated in the case of *Townsend* and *Walley* was, Whether the devise of an authority to sell lands was a devise within the statutes of wills, because the statutes were, that every one *having lands* might devise them to *another person*, and, in such case, there was no devise to another person, but only a devise that his executors might sell; and the Justices were of opinion that it was lawful within the statutes of wills, by the equity thereof, to devise an authority to sell lands.

Authorities are distinguished into two kinds; viz. First, Naked Authorities. Secondly, Authorities coupled with an Interest.

19 H. VIII. 9.
Pl. 4. Co. Litt.
113. 1 Roll.
Abr. 330, 14.
Howel v.
Barnes, Cro.
Oar. 382.
Garfoot v.
Garfoot, 1 Ch.
Ca. 75. Foone
v. Blount,
Cooper 464.

A naked authority is where a man devises that his executors shall sell his lands; or orders that his lands shall be sold by his executors; or appoints, constitutes, and impowers A. and B. whom he makes his executors of his last will, to *sell, let, or set to sale* his estate.

Keilw. 108.
Carpenter v.
Collins,
Moore 774.

In all these cases the executors have only a naked authority to sell, and, after the death of the.

the testator, the freehold descends to the heir, who is intitled to the profits until the sale. But the executors may enter, and make a feoffment of the land; and this will be a good execution of the will to convey the land to the feoffee, because he will be in by the devise.

9 H. VI. 24, 29.
11 H. VI. 13, 14.
Keilw. 45 a.
Co. Litt. 113.
1 Roll. Abr.
330. 14.

So if one devise that his land shall descend to his son, but wills that his wife shall take the profits thereof until the full age of his son for his education and bringing up; no interest is thereby devised to the wife, but a confidence; and if the son dies, the wife cannot intermeddle further with the land.

Keilw. 107, 108.
¹ Inst. 236.
Ibid. 265.
² Leon. 221.
Pl. 280.
³ Leon. 78.
Pl. 118.

And such bare authority is not affected by any alienation of the heir, or any other circumstance intervening. Therefore it was resolved by all the Justices, that, if the heir, after such devise of an authority, make a feoffment, or be disseised and the disseisor die seised, or otherwise such feoffments or bargains are made to the use of feoffees; in all these cases the devise will be nevertheless effectual, because the authority of the executors of the devisor cannot be impaired by any mesne act of third persons.

Keilw. 40.
¹ H. VI. 252.

Neither can such authority be released by the executors.

Co. Litt. 446.

Thus if a man, by his last will, deviseth that his executors shall sell his land and dieth, if the executors release all their right and title in the land to the heir, this is void; for they have neither right nor title to the land, but only a bare authority.

And such authority must be strictly pursued; for, the authority to sell is founded upon the will alone, without which no authority would let in the persons directed *to sell*; the law therefore looks upon the sale as a thing annexed to the persons of those to whom the authority to sell is given, and to no others; because of the special trust that is put in them by the testator, which trust no man can have by the will (which in this respect operates as a warrant of attorney) but only those who are named; and where there is but one of them alive, the authority is relinquished and gone, because, in such case, they do not take as executors *virtute officii*, but as trustees. And that is the reason why they may sell the land although they refuse the administration. But their executors cannot sell because the trust is personal, but it is otherwise where they take as executors.

²⁹ Hen. VIII.
11, 15 H. VI.
12.
Kelw. 44. b.
et vid. infra.

Jenk. Cent. 44.

Therefore, at common law, where the devise was that *two* executors should sell, one alone could not sell.

So

So where lands were devised to one for life, remainder over in tail, and, for default of issue, to be sold by the executors of the devisor, who made two executors and died, and then one of the executors died, and afterwards tenant for life and tenant in tail died without issue, and then the surviving executor sold the land. The court were of opinion that this sale was void.

Lock vrs.
Loggin,
1 Anders. 145

And if a man had devised that A. and B. should sell, and made them his executors, the one could not sell without the other, though one of them had refused to be executor or died.

So where *ceftui que* use willed, before the statutes, by testament, that A. B. and C. his feoffees should permit his wife to take the profits of the land during his life, and that, after her decease, the lands should be sold by his said feoffees, and the money received for the same paid to certain persons for certain uses prescribed. The testator died, A. died, and then the wife died; and the question was, Whether B. and C. the survivors might sell? and it was ruled that they could not.

Dyer 177, Pl. 32.

And the law is the same as to executors of executors; for, where one devised his lands to his wife for term of her life, remainder to

Moore 61.

another for life, and, after their death, that his lands should be sold by his executors, or the *executors of his executors*, and that the money arising should be employed for the good of his soul, and died ; and during the wife's life one of the executors died intestate, and afterwards the other made his executors and died, and then the wife and the other tenant for life died. Upon a question, Whether the executors of the executor might sell? it was held that they could not, because the authority was joint to the executors of *both* executors, and therefore if one failed the other could not execute it.

Dyer 219.
Godbolt et
Gouldsbor.
100.

Upon the same principle it has been held that, where a devise was that the executors should sell the land with the assent of J. S.—if J. S. die before that he assent, the executors shall not sell, notwithstanding that the death of J. S. was the act of God; and that in the life-time of J. S. they could not sell without his consent.

1 Anderson
^{146.}
Bro. Dev. 31.

But, if the words of the devise be answered, that is sufficient. Therefore if one make three executors, and devise his lands to be sold by his executors, and one of them die before the time of the sale, the other two may sell; because in that case the intent of the testator is taken to be that such executors who shall be alive at the time

time when the land is to be sold shall sell ; and this construction seems to accord with the words of the will, and the intent of the testator.

So where a man, having four sons in law, devised to his son in tail, and if he died without issue that his *sons in law* should sell and distribute the money among his daughters ; the son died without issue ; one of the four sons-in-law died, and then the devisor died. And it was adjudged, that the sons-in-law who survived might well sell ; for it appeared that the testator's intent was to advance his daughters. And the distinction, it was said, was, when the persons to sell were named by their special names and when not.

Croke Eliz. 26.
Vincent vers.
Leigh,
Dyer 176. b.
S. C. ibid. 219.
a. Co. Litt.
113. 2.

Again, where one devised that his executors or any of them, or the executors of his executors or some of them, should sell his land for payment of his debts, and made three executors, and gave 40*l.* legacies by his will, and died. One of the executors died, and the other two sold. And one question was, Whether two of the executors might sell, when there were only two left, by reason of the words that gave the authority to the executors or any of them. And the court held the sale by two good by the intent of the will.

Townsend vers.
Walley,
Moore 341.
S. C. Cro. Eliz.
524.

Another

2 Leon. 220.

Another exception taken to this strict rule, as to authorities not surviving, was, where a man devised his lands to his wife for life, and that, if he should have no issue by his wife, then, after the death of his wife, the lands should be sold, and the money thereof coming distributed to three of his blood, and made his wife and another executors, and died. One executor died, and the other, the wife being living, sold the lands. And it was held that the sale was good, although it was not expressed in the will by whom the lands should be sold.

Dyer 371, b;

So where a man devised all his manors, &c. to his sister, excepting out of this general bequest his manor of R. which he appointed to pay his debts, and made two executors by name, and died. One of the executors died, and then the other sold the land, and the court held that sale good.

Anderson 145.
Keilw. 45.

The principle upon which the two preceding cases seem to have been decided is, that there was an authority given by the testator, but no appointment by express words what person should sell the land, for which reason the law implied that they should do it that had power to pay the debts or distribute the money, which were the executors. The executors, therefore, in such case took

took only in their official capacity, and as where one died the office survived, the authority to sell survived likewise.

And it seems that in such case the executors of the executor might sell the land; because by the common law, before the Statute of 25 Edward III. c. 4. which gives an action for the executor of an executor, the executor of an executor had power to distribute the goods of the first testator; and the making such devise of the land is but to direct a distribution, which he might well make by the common law,

Vide Keilw.
107, 108.

Upon a similar principle it has been held that, if the executor be not concerned and no one be appointed to sell, it ought to be intended that he should sell who has the land, viz. the heir.

Thus where a man devised land to his wife for life, and that after her death the reversion should be sold, and the money arising therefrom be distributed between his heir and three nephews. The heir refused to sell or join with the wife in a sale. And a bill to compel him to join was dismissed by Lord Keeper *Bridgman*, he holding the will void as to a sale, it not being named who was to sell. But this judgment of dismission was reversed in the House of Lords, and the heir decreed to sell.

Pitt vers.
Pelham,
1 Lev. 304.
2 Ch. Ca. 176.

And

Gore v. Blake,
1 Ch. Ca. 98.
Dyer 210.
Carter 25.
Lane 26, 27.

And in all these cases of interests the estate shall not determine until the time limited, although the object of their creation fail; as if the children to be maintained die, or the debts be paid before the term limited to answer them determines.

Smith v.
Havens,
Cro. Eliz. 252.
2 Leon 221.
3 Leon 78.
Hutt. 36.
Balder v.
Blackburne,
Hob. 285.
S.C. 1 Brownl.
79.

And if the devisee in such cases die, his representatives shall have the lands during the time.

The principle upon which the last preceding cases turn is, that the charging the profits until a certain period or event amounts, in law, to a term to continue until that period or event arrives.

Co. Lit. 113,
note 2.
Co. Lit. 236.
Sed vid. Co.
Litt. 181. b.
note 3, where
Mr. Hargrave
seems to con-
fine the obser-
vation to cases
where execu-
tors take as
such.

Some doubts having been suggested in a late publication, revised by a gentleman, as justly distinguished for the depth of his knowledge as for the solidity and clearness of his judgment, respecting the existence of a distinction between a devise *that executors shall sell his land* and a devise *of lands to his executors to be sold*, the former being held to convey a naked authority, the latter an authority coupled with an interest, I trust I shall not be thought tedious if I make some observations upon the grounds upon which this doubt is raised; for, although, in many instances,

instances, the court of Chancery will interpose and prevent such devises] from failing for want of parties to sell, (the court considering the application of the money to be raised by the sale as the substance of the devise, and the persons named to execute the power of selling as trustees merely, which brings the case within the general rule of equity, *that a trust shall never fail of execution for want of a trustee, and that if one is wanting the court shall execute the office*) yet many cases may be put, in which a court of Chancery could not interfere to supply a defect for want of proper parties to execute such an authority. One instance of this kind occurs on a moment's reflection. Suppose one devised that his executors should sell, and then appointed *two* executors, one of whom died. If the heir, on whom the land descends, sell to a purchaser without notice, it is clear that if the cases put *Jenkins's Cent.* 44, and *Dyer* 177, be law, the remaining executor could not sell; it is equally clear that the authority being extinct by death, the alienation by the heir would be unimpeachable unless the authority could be revived; and yet a court of Chancery could not, consistently with their rules, give relief against a purchaser for a valuable consideration without notice. In such case, if these words gave a bare authority, those who were to be beneficially interested thereby

Pitt v. Pelham,
1 Lev. 304.
Gwilliam v.
Rowell, Hard.
204. Lockton
v. Lockton,
2 Freem. 136.
Garfoot v.
Garfoot, 1 Ch.
Ca. 35.

Supra 295.

would be without remedy by reason of the act of the heir, but on the contrary if they gave an interest, the estate would be vested in the executors, and the act of the heir could not affect it.

Hard. 419.

In the Note alluded to, the learned editor principally relies on a case referred to by Lord *Hale*, in the case of *Barrington v. Pincheon*, (wherein it was not necessary to determine this point) in which it is said to have been adjudged against the distinction, as warranting a conclusion that this is not a settled rule of construction. But upon referring to 15 H. VII. 12. which is the authority alluded to by Lord *Hale*, nothing will be found to warrant the conclusion, " that if a man " devise that his lands shall be sold by his execu- " tors for payment of his debts, it will give the " executors an interest in the like manner as if " he had devised his lands to his executors to be " sold."

Indeed, in the book alluded to, there is an observation by *Fineux*, that if a man has feoffees upon confidence in his land, and makes a will that his feoffees shall alien the land to pay his debts, there the creditors may compel the feoffees to alien; which opinion seems to proceed on the ground, that the will operates in the nature of a declaration of the use, and may be enforced by subpoena.

In

In the principal case there stated, one enfeoffed A. and B. upon trust, &c. and then made a will, and reciting that A. and B. were seised to his use, willed that the said A. and B. should make an estate to his wife for life, the remainder to his son and heir in tail, and, in default of such issue, then willed that the feoffees should alien the land, and distribute the money arising therefrom for the good of his soul. The feoffor died, and then the feoffees made a feoffment over to the same uses, and declared that the feoffees should act according to the will. Then the wife and heir died, the latter leaving no issue; and afterwards the second feoffees aliened the land to a stranger in fee. And the question was, Whether this alienation was good or not? And it was held by *Fineux* and *Tremain* that it was, for, that the second feoffees might alien the land by command of the first feoffees, for then the alienation would, in law, be the alienation of the first feoffees. But they held, clearly, that the second feoffees could not have aliened the lands during the lives of the first feoffees, were it not *by their command* which made it as *their act*. And upon the same principle, namely, that it would not be the act of the first feoffees, they held that the second feoffees could not alien *after* the death of the first feoffees: but they took a distinction, where a will was, that the alienation should be

made to a person certain, and where the alienation was limited in general terms ; for they said that if a will were that the feoffees should alien to J. S. there if they made a feoffment over to the same use, the second feoffees might make the alienation, because there it was in the nature of an use to J. S. But where the words were, that the said feoffees should alien generally, there the authority was solely given to them, and if they would not alien and died, no other person could; and it was compared to the case of executors having such a power devised to them, in which case, it was said, that, if the executors refused, feoffees to uses, nor no other person could execute *it for them.*

Howel v.
Barnes.
Sir W. Jones 352.
Cro. Car. 382.

The case of *Howell and Barnes* is likewise mentioned as another authority for this doubt, but that case seems to have been decided upon the particular manner of wording that devise. There the devisor, after giving an estate to his wife for life, devised his lands "to be sold by his executors there undenamed, and the monies thereof coming to be divided among his nephews;" and of the same will made W. C. and R. C. executors; W. C. died, then the wife died, and afterwards R. C. sold; and, on reference out of Chancery, this was held good by three Judges, *Jones, Crooke, and Berkley.*

But,

But, as the above case is reported by Sir *William Jones*, it is stated, that the devise was that the lands should be sold by the testator's executors for payments of debts and legacies, and that two executors were appointed; from both which circumstances it was reasonable to conclude that the executors were to sell *virtute officii*; for *they were appointed by their official description, and were to apply the produce officially.* Jenkins 44
And this case differs from a devise that A. and B. shall sell, who are afterwards made executors, or, that *two executors shall sell*; because there the naming them by their proper names, or mentioning the number, annexes a personal authority to A. and B. or to the *two executors*, and appropriates the trust to them as private persons.

19 H. VIII. 9

Upon this nicety of distinction, as to the intent to be drawn from the words of the testator, the case of *Isabel Goodcheap* was also decided. That was a devise to R. G. in tail, and, if he died without heir of his body, the said lands to be sold and to be distributed for the good of his soul by his executors, or, in case they should be dead, by the executors of his executors and four parishioners of the parish in which the lands were; and W. D. W. M. and J. C. were made executors. J. C. died living tenant in tail. W. M. never intermeddled with the effects. W. D. entered

X 2 and

49 E. 3. 16.

and sold. And the question was, Whether this sale was good? and it was held, after great argument, that it was; for, from the special penning of the will, it was clear that the executors of the executors with the parishioners were not to intermeddle, as long as any of the executors lived; for the words were, *quod predicta tenementa vend. per executores meos et si omnes obierent per eorum executores et per quatuor parochianos.* From which clause it clearly appeared, that the executors of the executors were not to act until all the executors were dead, but they were then to sell; from which it might reasonably be concluded that the intent was, that the executors, or such of them as should live, should sell, and the more so, as it was not reasonable to suppose that the devisee could imagine that all the executors should outlive the termination of the estate tail.

The above case (which is that alluded to as cited by *Brooke* in support of this position in the Note now under consideration) not warranting the position, any more than the case of *Howel and Barnes* (which is the case alluded to as decided by three Judges in the time of Charles) both of which seem to me to turn upon the particular penning of the respective devises therein questioned, the only authorities left by which the editor's

editor's doubts in the note referred to can be supported are, first, Bro. Abr. Dev. 50, which, when referred to, will be found to refer again to Bro. Abr. tit. Aff. 356, which will be found to refer to 39 Aff. Pl. 17, which is the case of a devise of lands to executors to sell; and it is there stated, as has been already shewn, that by such words an interest passes and the fee is in the executors until sale, in which case the interest survives, and, consequently, may be sold by the survivor. And secondly, *Perkins*, sec. 550, which seems to be grounded on the observations and arguments 15 H. VII. 11, 12, which by no means support the proposition there put.

If this point wanted a further illustration, the statute 21 Henry VIII. cap. 4. made expressly to remedy the inconvenience that arose from this strict construction of such authorities, in instances where one of the executors so circumstanced refuses to intermeddle with the execution of such a will or testament devising lands, tenements, or hereditaments to be sold by executors, by enabling the other executors who accept and take upon themselves the executorship to sell, and rendering their disposition valid, seems to me decisively to warrant the opinion of Lord *Coke*, that, at common law, all the persons endowed with such a naked authority must unite in the execu-

tion of it, unless in cases where the evident intent of the testator renders a contrary construction absolutely necessary.

Powers to be exercised over lands through the medium of uses, may likewise be created by devise. As if one devise to J. S. and his heirs, to the use of A. for life, remainder to B. in tail, with power to A. to limit a jointure, or to lease, or charge. And such power seems to be a legal estate taking effect under the statute of uses, as the limitation of an use.

Mr. Booth's
opinion cited.
Co. Litt. 278:
in note.

But I should here mention, that an opinion of high authority has been conveyed to the world through the medium of a late publication, in which this mode of such a devise, as that last-mentioned, taking effect is denied, upon the ground, that there will be no seisin in J. S., the devisee to uses, consequently no such use in A. or B. as is executed by the statute of uses, I shall trespass for a moment upon the reader's patience, by some observations also on this point.

Powers to make jointures, or to lease, or charge estates, were originally mere modifications of uses, taking effect as directions to feoffees (*i. e.* trustees) as to the disposal of estates in land in particular events; these directions

tions might have been either as to the immediate application of the profits, or, as to its application on future events or contingencies. The performance of these directions were at first binding upon the conscience only of such trustees, and therefore cognizable only in Chancery. The statute of the 27th Henry VIII. which extended to all uses, as well future when they came in *esse* as present ones, rendered useless the jurisdiction of Chancery over them, by taking away the intermediate character of trustee and consolidating the use and legal estate. Now, the letter of that statute being, "that where any person stands or is seised, or at any time afterwards shall happen to be seised," it is necessary, to bring a case within this statute, that there be a person seised to the use at the instant when the use is to be executed, upon whose seisin the statute may attach, and thereout execute the uses limited to take effect out of the estate conveyed to the trustee for that purpose. Then, according to ^{1 Rep. 120.} *Chudleigh's case*, all the seisin that is by such instrument creating uses conveyed to the trustees, is immediately executed in or transferred to *cestui que* use of the present uses *i. e.* uses in *esse* and which vest immediately. And as to the uses not in *esse*, there is no present seisin existing anywhere, but only a possibility of seisin in the feoffees to serve those uses when they come in

eſſe, which is realized as the contingencies on which the future uses depend arise, and which uses then, by force of the statute, draw to themselves a sufficient estate or ſeisin (part of the original estate or ſeisin reviving by operation of law in the trustees) to serve them, so that they may be executed by the statute and the poſſeſſion transferred to them.

To apply, then, the statute, as explained in *Chudleigh's* case, to the instance put by Mr. *Booth*. The moment the instrument operates J. S. and his heirs become ſeized by virtue of the statute of wills of an estate in fee, upon which ſeisin the statute of uses immediately attaches, and executes or transfers that ſeisin to all uses in *eſſe*, viz. to A. for life, remainder to B. in tail, remainder (if there be no further limitation) as a use resulting in the right heirs of the devifor. At that moment ALL ſeisin passes out of the devifee to uses, and executes in *ceſtui que* use; for the trustee to uses has but a fee, and, either by positive limitation, or by construction of law, that fee is transferred to the use in fee which is in tenant for life remainder to B. in tail remainder to the right heirs of the devifee. But still this transfer is with a poſſibility of a ſeisin ſpringing up in the trustees to uses, whenever any use under the power, which is a future use, calls for an execution,

cution, that is, whenever A. makes a jointure, &c. Then that use, coming in *esse*, draws to itself the seisin revived in the trustees, which is just that seisin which is necessary to feed that use; and so, by construction of the statute, the jointress, lessee, &c. derive their interest out of part of the first seisin given by the devisor to the devisee.

^{1 Rep. 139.}

Thus it was said in the case of *Broughton and Langley*, that the trustees, though the estate was executed in tenant for life remainder over, might execute the power and join in making of the jointure; and when it should be made, the jointress would be in by the will, that is, her estate would take effect out of the seisin limited to the trustee to uses by the will, and not out of any estate in *cestui que use* who made the jointure.

*Broughton v.
Langley.*
*Supra, L. Raym.
873.
2 Salk. 679.*

OF THE

D E V I S E.

IT is a necessary incident to the constitution of every devise, that there be an appointment of a devisee capable of taking.

The custom of devising being annexed to the land and not to the person, it followed, that, if lands were devisable, the owner might have disposed of them as well in mortmain as otherwise. But the power of devising given by the statute of the 32d Henry VIII. as explained by the 35th Henry VIII. was restrained to any person or persons except bodies politic or corporate, which excluded devises in mortmain; and although the 43d of Eliz. c. 4. was construed to authorize a devise to a corporation for a charitable use, as operating in nature of an appointment rather than of a devise; yet the 9th Geo. II. cap. 36. checked this practice by prohibiting such dispositions, as tending to defeat the political ends of the statutes of mortmain.

Deivees,

Devisees, therefore, of land may now be either natural persons or civil persons, and not expressly or by inference excepted out of these statutes.

Natural persons may be either persons in *esse* or persons not in *esse*.

First, Natural persons in *esse*.

All natural persons in *esse* may be devisees, unless labouring under some civil disqualification.

Coverture creates no disability in a woman to take as a devisee. But, at law, if her husband disagree, afterwards, that will avoid the devise: yet equity would interpose in such case, and prevent a husband from prejudicing his wife, by dissenting to her taking a benefit under a devise.

Nor is a wife disqualified by her coverture from being a devisee to her husband, either under the custom or the statute; for the reason that she cannot be a grantee under a grant from her husband, is, because the husband and wife are one person in law, which does not apply in case of a devise; because the husband has

Vid. Perkins,
sec. 43, 44.
But note, Per-
kins relates
only to a con-
veyance made
to a wife. The
principle how-
ever applies.

I Eq. C2. Abr.
173, 9.
Fitzh. Dev.
285, 13.
Co. Litt. 112. b.
1 Roll. Abr.
610. Bro. tit.
Dev. 18, 34.
Ca. T. Holt
241.

the estate radically in him, and the devise does not take effect until after his death, and then they are no more one person.

44 A.R. 36.

Thus 44 A.R. 36, the custom was laid, that before time of memory, by the usage of the borough of *Stafford*, a man might devise his tenements to his wife in fee, as well as to any other person.

Knight verf.
Du Plessis,
2 Vez. 360.

It seems to be no objection to a devisee, *qua* such, that he is an alien; for where it was urged on a devise, that, supposing it well executed, yet it would be void, for that the devisee was an alien, and, consequently, incapable of taking for her own benefit, and *then* she could not take by devise; Lord *Hardwicke* said, that he would not enter into that question minutely, nor give an opinion upon it; that he could not cite a case that such a will would be good: but he did not remember any doubt or distinction made between a grant, conveyance, or devise to an alien, for an alien might take: the only consideration therefore would be, for whose benefit, and if he might take for the benefit of the crown. There was no rule of law or upon the statute of wills in the way, why he might not take by devise,

This

This opinion of Lord *Hardwicke*, that an alien may take by devise, seems strongly countenanced by the opinion of the court, in the case of *Godfrey and Dixon*, that, on a covenant to stand seized, an use will arise to an alien; for, if so, then if, before the statute of wills, a man had conveyed lands to the uses of his will and *then* devised the same to an alien, such declaration of the use would have been good, because a use would have arisen to him as well upon a conveyance to uses as upon a covenant, the principle being the same in both cases. If so, a devise, after the statutes of wills, to any person who was capable of taking before by a will disposing of an use, will be valid; for those statutes made no alteration as to the capacity of the persons to take by devise. Then the question is, To whose use, or for whose benefit he shall take? and in that respect, there appears to be no ground for distinguishing between the case of a devise or of any other conveyance; for when an alien takes by will, the estate, on the will's being consummate, vests in him, and he is in *to all intents and purposes* as any other devisee would have been, until something further be done to take the estate devised out of him again; for, as long as the alien lives, the inheritance is not vested in the king, nor shall he have the land, until office found; and therefore, before office found, a recovery

Godb. 275.
Noy. 137.

Gouldsb. 162.
4 Leon. 84.
9 Co. 141.

covery by an alien tenant in tail will bar the remainders, he being tenant of the land: but, if he die before office, the laws casts the free-hold and inheritance upon the king for want of heirs, an alien having none. So that the title of the crown is collateral to the title by the devise, has no retrospect to the time of its being consummate, nor does it affect the land in the hands of the devisee until another thing is done to intitle the king, not under the devise but by right of his prerogative, viz. office found; the tenant being an alien, and consequently, though of capacity to take lands *in his own right*, yet not of capacity to hold them.

And since the statute of the 18th Geo. III. c. 60, which repeals so much of the statute of the 11th and 12th Will. III. c. as disables persons educated in the Popish religion, or professing the same, under the circumstances therein mentioned, to inherit or take by descent, devise, or limitation in possession, reversion, or remainder within the kingdom of *England*, &c. provided such persons, within the time limited by the act of the 18th Geo. III. take the oath prescribed thereby, Papists complying with that oath are likewise capable of being devisees of real property.

A bastard

A bastard cannot be a devisee until he have gained a name by reputation.

Vid. *infra*, et
Co.Litt.13 edit.
3 b. et note 1.
ibid Dyer 313.
Noy 35.

But having gained a name by reputation, he may take, being described thereby.

Perk. 26.
Noy. 35.
Leon. 48, 49.

Natural persons in *eſſe*, made devisees, may be either certain or uncertain.

Certain, as where a devise is to A. or B. or the like, accompanied with proper circumstances of identification.

Uncertain. Thus, where one by will devised all his lands in *Kent* and *Suffex* to one of his cousin *Nicolas Amberſt's* daughters, that ſhould marry with a *Norton* within fifteen years. *Nicolas Amberſt* had three daughters, *Elizabeth*, *Anne*, and *Mary*. *Stepben Norton* married *Elizabeth*; and on a question, between the heirs at law and the devisee, who ſhould have the land, one objection taken by the heir at law was, that the devise was void for uncertainty as to the person, for, two might marry with a *Norton*. But the court agreed that the devise was good, notwithstanding the uncertainty; for that, although the words were not, *who ſhould first marry with a Norton*, yet it was all one, because the law ſupplied

Bate v. Norton,
T. Raym. 82.

plied these words in a deed : and, even in the king's grants, if two constructions were made and one made the grant void and the other not, then the latter should stand, *a fortiori* in this case ; and therefore it should not be presumed that more than one would marry a *Norton*, especially as the words of the will fixed in a single person ; and they said there was a difference when there was uncertainty in' the event and uncertainty in the person.

Litt. Rep. 256. So a devise may be to R. or B. *which shall have issue first* ; or to the first son of A. that shall have issue.

Secondly. Natural persons *not in esse*.

Per Babington,
9 H. VI. 23.
Br. Dev. 5.
2 Bulst. 275.
3 E. Ca. Abr.
173, Pl. 14.

9 H. VI. 23.
11 H. VI. 12,
13.

And, as to these, a distinction seems to have been formerly taken between a present devise to them and a devise to them by way of remainder ; for, if there were a tenant for life in *rerum natura* at the time of the devise, but no person in remainder *in rerum natura*, yet the devise was good if he in remainder were in *esse* at the time when the remainder fell in. As a devise by a man of his hereditaments to his wife for life, and, after death to remain to I. son of the testator, and to his heirs males of his body engendered,

dered, and for default of such issue to the next heir male of the devisor and the heirs male of his body. In this case it was held that the devise to the next heir male of the devisor would have been good on the demise of the wife and I. without issue, if an heir male had been born previous to those events ; but no heir male having been born until after those events had happened, that limitation was held to have failed, and the estate to have vested irremovableably in the heir at law of the devisor.

So where W. seised of a copyhold of inheritance, surrendered it to the use of his last will, and, having a son born and another *in ventre sa mere*, devised part of his land to his son or daughter with whom his wife was *enfaint et baredibus suis legitime procreatis*, and the residue to his son born, to him and his heirs of his body, and, if he died without heirs of his body, to remain to his child *in ventre sa mere*, and if both died without heirs then over ; the devisor died, and then the wife had a daughter ; and on a question, Whether the daughter *in ventre sa mere* could take by purchase a real estate, as a copyhold was ? it was held, by all the Justices, that she might take an estate in remainder therein.

Church v.
Wyat, Moors
637, et vid.
2 Bulst. 273,
275, 276.

It is necessary here to observe, that it is stated in the last case, that the wife of the devisor entered and was admitted; from which circumstance, and from the judgment of the court, it seems reasonable to presume, that there was an estate for life limited to the wife previous to the estates to the children in tail.

But, on devises made to persons *not in esse*, a distinction seems to have been formerly urged between the appointment of such devisee *per verba de praesenti*, or *per verba de futuro*: And although it be now clear, that a person *not in esse* may be a devisee *per verba de futuro*; yet it is not settled whether he may *per verba de praesenti*.

¹ Eq. Ca. Abr.
173. Pl. 12.

² Bulst. 275.
Mich. 12 Ja.
S. C. 1 Roll.
Rep. 109.

Snow v. Cutler
Sid. 153. 1 Lev.
135. Salk 229.
Godbold 386.

Thus, in the case of *Snow and Cutler*, the Court, consisting of *Wyndham, Moreton, Twisden, and Keeling*, expressed themselves clearly of opinion, that a devise to an infant *when it should be born* would be good, and the land would descend to the heir in the mean time.

Andrews v.
Fulham,
Strange 1093.

So where W. devised messuages in *London* to his wife for life, and, after her decease, to such child as she was then supposed to be *en-saint* of, and to the heirs of such child for ever. It was said by *Lee*, Chief Justice, who delivered the opinion of the Court, that, though formerly

Formerly it had been doubted whether a devise to an infant *in ventre sa mere* was good, yet it was then clear, that where it was *per verba de futuro*, it would take effect. That the words therefore would have been sufficient had any person come in being capable of taking; but the wife not being *enfaint*, the estate never took effect.

With regard to a devisee constituted *per verba de præsenti*, a distinction has also been attempted between devises by custom and devises by statute; and it has been said that, without all question, such a devise was good at common law, and that the doubt only arose on the statutes of Hen. VIII. which enact, that it shall be lawful for a man, &c. to devise his lands to any *person* or *persons*; because in such case the devisee, not being in *rerum natura*, in strictness of speech is no person; and therefore that under those statutes such devise is void. But this distinction will be found not to be warranted by any authorities; for this doubt appears to have been started in a case in the year books, 11 Hen. VI. 13, in which *Babington* and *Paston* were of opposite opinions upon it; and the case in *Roll's Abr.* 6c9, H. Pl. 2. seems to be an opinion of *Roll* formed after the statute of wills, and founded upon its being an executory devise.

2 Mod. Rep. 3;

Insta 326.

Mich. 13.
14 Eliz.

Sed nota. It was said in Snow and Cutler, that on reference to the record, it did not support the case as here put.

The first case I have met with, in which the subject of a devise to an infant *in ventre, &c. per verba de praesenti* was fairly brought under consideration, is in *Dyer* 303 b. Pl. 49. There a man, having five sons and his wife being *enseint* with a sixth at the time of his death, devised, that one third part of his lands should descend to his son and heir, and the other two parts he gave and bequeathed to his four younger sons by name and the heirs males of their bodies, and if the infant *in ventre sa mere* were a son, then he to have a fifth part as co-heir with his four younger brothers. A sixth son was born after the death of the father; and it was held, upon this case, by *Dyer*, *Bendlowe*, and *Meade*, against the opinion of *Wbiddon*, that the son born after the death of the devisor took nothing; for, he had not the capacity of taking as a purchaser when the devise first took effect, because he was not then *in rerum natura*.

Supra 321, et
Moore 637.
Hill, 27 Eliz.
S.L. per Paston,
9 H. VI. 13 b.
et per Coke
in Sympson v.
Southerne,
2 Bulst. 273,
275, 276.

So, in the case of *Church* and *Wyat*, it is expressly said to have been resolved by all the Justices, that an infant *in ventre sa mere* could not take a real estate in possession by purchase, but it might take in remainder, as the case was there.

This

This opinion respecting a devise to an infant *in ventre sa mere per verba de præsenti* was adopted *arguendo* by *Gawdy* and *Fenner* in the case of *Fuller and Fuller*; for they agreed, that an infant so circumstanced should take if publication of the will were made *after its birth*; because, *per Gawdy*, there is the testator's will written *that he should have it*, and it is expressed by his words afterwards.

Fuller v. Fuller,
cited *Dyer* 304
in notes. *Mich.*
27. 28 Eliz. et
vide case *Cro.*
Eliz. 423.

Vid. Cro. Eliz.
423.

And *Powell*, Justice, in the case of *Scatterwood and Edge*, said that a devise to an infant *in ventre sa mere*, by the better opinions though various, was not good.

2 Salk. 230.
vid. inf. 326,
327.

So *Bridgman*, in the case of *Bate and Norton*, lays it down as clear law that such a devise is not good.

Bate v. Norton,
T. Raym. 83.
but he relies
upon *Dyer*
303. *Pl. 49.*

But *Meade and Periam*, Justices of the Common Bench, affirmed, in *Mich. 24 Eliz.* that it had been adjudged there in the time of Lord *Dyer*, that if land were devised to two men and to the child with which the wife of the deviser was *enseint*, the devise was good, and the child should take thereby; but Lord *Dyer* doubted whether he should take in common or in joint-tenancy.

Moor 177.
Pl. 312.

And *Powell* Justice, and *Treby* Chief Justice, were of opinion, in the case of *Scatterwood* and *Edge*, (although *Powell* thought the weight of opinions was the other way) that such a devise as that last stated would be good; for, by the devisor's taking notice that the devisee was *in ventre sa mere*, he must intend a future devise.

So *Roll*, in his Abridgment, 609. H. Pl. 2, states, that a man may devise to an infant *in ventre sa mere*, although the devisor die before the infant be born; because he was *in esse* in some respect, and the freehold is *in the heir in the mean time*.

Snow v. Cutler,
Lev. 135, 156.
S. C. Sid. 153.
2 Keb. 567,
752, 800, 801,
802 et 851.
2 Keb. 11,
145, 296.

Vide supra 324.

And in the case of *Snow and Cutler*, *Twisden* Justice, and *Keeling* Chief Justice, held, that a devise to an infant *in ventre sa mere* was good, and was tantamount to a devise to an infant *in ventre, &c. when it should be born*; and they said that *Hale*, Chief Baron, was of that opinion, and had told them, that he had caused the Roll of the case stated *Dyer* 303, to be searched, and that it did not warrant the opinion; and so said *Hyde*, Chief Justice, when this case was argued; viz. that he had viewed the Roll, and was of opinion with *Hale*.

The case of *Snow and Cutler* was thus: One, ^{Supra 326.} seized of a copyhold of inheritance, surrendered it to the use of his will, and, thereby, devised it to the heirs of the body of his wife if they attained the age of fourteen years. The testator died without issue. Afterwards the wife married and had issue. And, on a question as to the validity of this devise upon the principle respecting which we are now treating, the Court, after many arguments, were divided in opinion, *Wyndham* and *Moreton* being against the validity of the devise, and *Twisden* and *Keeling* holding it to be good.

And *North*, Chief Justice, said, in the case of *Taylor and Bydall*, that, at that day, a devise to an infant *in ventre sa mere* was held good; because the law would infer that the devisor did intend it to him *when he should be born*, so that it worked in the nature of an executory devise; and when it appeared that the testator did not intend that the devise should be executed presently, then it should wait; and that should be supposed to be the intent of the testator in this case.

Taylor v. Bydall,
1 Freem. 244.

And in the following case, *Finch*, Lord Keeper, seems to have fairly decided the question, in Chancery, in favour of such a devisee.

Nurse v. Year-
worth, 2 Mod.
Rep. 8, 9.

In this case, one, having then no issue but his wife being *grossement enceint*, devised lands to the heirs of his body on the body of his wife begotten, and, for want of such issue devised them over, and died; afterwards a son was born: And it was objected, that the devise to the infant *in ventre sa mere* was void. But it was decreed, in Chancery, to be a good devise. And his Lordship mentioned two cases in the Common Pleas, one in the time of Lord Chief Justice *Hale*, the other in Lord Chief Justice *Bridgeman's* time, wherein it had been resolved, that if there were sufficient and apt words to describe the infant though *in ventre sa mere*, the devise might be good.

Alluding to the
case of Snow
and Cutler,
supra 327.

But, in the preceding case, the Lord Keeper said, that in the King's Bench the Judges had, since the decisions he alluded to, been divided upon this point; and as the law stood then adjudged, the devise in the above case seemed not to be good. But, should the case come then in question, he said, he was not sure that the law would be so adjudged; for, it was hard to disinherit an heir for want of apt words to describe him, and there was all the reason in the world that a man's intent, he lying *in extremis* when most commonly he was destitute of counsel, should be favoured.

And

And the Court of Common Pleas seem, in a subsequent case, to have been of the same opinion as the Lord Keeper, upon the ground that such a devise is, in its own nature, a devise *in futuro*.

Gulliver v.
Wicket,
1 Wils. 105.

The admirable treatise on Contingent Remainders expresses the author's opinion upon this point in the following forcible words : "There certainly can be no doubt," says he, "that a devise to such infant (*i.e.* an infant *in ventre sa mere*) necessarily implies a future disposition to take effect at its birth, as much as if the words, *when he shall be born*, were added; for surely it cannot be imagined that the child should take the estate before it was born."

Fearn on Con-
ting. Rem. 422.

From the above cases, upon an accurate examination, there appears only to have been two actual decisions, at law, upon this point ; namely, that reported in *Dyer* 303, Pl. 49, which is stated to have been objected to by *Hale*, Chief Baron, and *Hyde*, Chief Justice, as not warranted by the Rolls ; and the case cited by *Meade* and *Periam*, *Moore* 177, which seems to have been a clear adjudication of this question in favour of an infant *in ventre sa mere* being capable of being a devisee *per verba de presenti*; which latter

latter decision appears to have received the sanction of the greatest number of authorities since; for Coke's opinion, in the case of *Simpson and Southern*, being founded on the case in *Dyer*, and therefore going no further than that case warranted, there remains only the *dictum* of *Bridgman* and the opinions of the Justices who decided the case of *Church and Wyat*, against such devisee, opposed to the opinions of *Powell*, *Dyer*, *Treby*, *Roll*, *Twisden*, *Keeling*, *Hale*, *Hyde*, and *Finch*, in its favour.

Vid. *Dyer*
274 b. Pl. 42.
cites 18. E. 3.
A demise to a
man to hold to
him and to his
first son to be
begotten, not
good either by
way of joint-
tenancy or re-
mainder.

This difference of opinion, as to such a devisee constituted *per verba de praesenti*, and *per verba de futuro*, seems to have sprung from the strictness with which Judges in early times regarded executory devises, which were suffered to exist in no cases, unless supported by the manifest intention of the testator; and the intention to create a future devise in favour of a devisee *not in esse*, was considered in those times as not sufficiently evinced, by the mere fact of the testator's devising to an infant *in ventre sa mere per verba de praesenti*; it not being then considered, that the devise being in its nature not capable of taking effect in *praesenti*, was a ground from whence it must necessarily be inferred, that it was intended to take effect in *futuro*. As it was by no means unfair to contend that a devisor,

devise, when using those words, might not advert to their precise operation, or be aware of the distinction between an estate to commence *in futuro*, which could only take effect by way of executory devise, and a present estate. It seems therefore to have been then held necessary that, in order to pass an estate by executory devise, there must have been an apparent *express* intent arising out of the words of the will, which the principal case was held not to furnish evidence of, their natural import being that a present estate was to pass. Thus, a devise to the heirs of J. S. where J. S. is living is void, because it shall not take place as an executory devise, there being no ground to argue that the testator meant a future devise from the mere circumstance of his knowledge that J. S. is living, and the words carrying a present devise, it fails, because J. S. being living can have no heir. So on a devise to the issues of J. S. such only as are living at the time of the gift shall take. And, the like law is of a devise to A.'s first son, he having none; for it does not import notice in the testator of that fact. But, *per Powell*, though a devise to A.'s first son does not import that A. has none, yet, a devise to one *in ventre*, &c. by the taking notice that the devisee is *in ventre*, shews the testator intends a future devise: and *Treby* agreed in that opinion.

2 Keb. 297.

Per curiam,
2 Salk. 226,
229.

2 Keb. 297.

Ibid. 291.

Per Powell,
2 Salk. 229.

But,

But, whatever may be the construction put upon the claim of a mere devisee *in ventre sa mere*, whenever that case shall again occur, the law is now fully settled in all cases where there are any express words used, or facts adverted to by a testator exercising his bounty towards an infant *in ventre sa mere*, from whence an implication or inference can be drawn, that he was aware the devisee could not take immediately.

First, where there are express words used.

As a devise to an infant *in ventre sa mere when he shall be born.*

Secondly, by implication or inference from facts.

As a devise by one that, if the child with which his wife is *enfaint* shall be born, it shall have a share with the rest of his children.

Woodley et
Nightingall,
cited 2 Keb.
300. Ferrier v.
Faffet, C. B.
1655, cited
2 Keb. 752.

Cited ibid.

So in the case of *Bate against Amburst*, C. B. 15. Car. 2. a devise by *Amburst* to the heirs of the body of J. S. taking special notice that J. S. had no heirs at the time, was held a good devise to after-born issue.

And

And a devise to the heirs of J. S. after the death of J. S. is good by way of executory devise. And the like law would be of a devise to the first son *to be begotten*. So of a devise to the first son of J. S. when he shall be born.

Per Cur. & Salk.
229, 230.

Ibid. 230.

Kelton v. Bide,
cited 2 Keb.
300.

Again, where B. devised all his freehold, copyhold, and leasehold, and all his real and personal estate to trustees, their heirs, executors, and assigns, in trust to pay his son J. B. £. 27 quarterly, and, if he married with consent, then double the sum; and, if he should have any child or children, he gave the rest and residue of the yearly rents and profits of the said trust estate, over and above the said yearly payment, to be applied, during the life of the said son, for the education and benefit of such child or children; and, after his son's decease, he gave one moiety of the said trust estate to such child or children of his said son as he should leave, and their respective heirs, executors, and administrators, and to the survivor; and the other moiety he gave *to the child and children of his grandson J. D. and every other child and children of his daughter, their heirs and assigns, and the survivor of them.* And, in case J. B. died without issue, he gave the first moiety to J. D. and any other child and children of S. his daughter and their heirs, &c.

Chapman v.
Bliffet, C^o,
T. Talbot 145.

and

and appointed £. 100 *per annum* as a jointure to any wife his son J. B. should marry, in case he married with consent; and gave to his grandson J. D. £. 30 *per annum*, for his maintenance until *the age of fifteen*, and then £. 200 to put him out apprentice. One question was, Whether the children of J. D. took by way of executory devise? And it was objected, that the devise to *the children* of J. D. was *per verba de praesenti*, which were only proper for a remainder, and to make an use executed; for, whenever the devise was *in verbis de praesenti*, and the testator intended a present devise, no fact could alter it, and, if it could not take effect as such, it should rather be void than be construed a future devise; the consequences being no ingredient in the construction. But Lord Talbot, Chancellot, was of opinion, that the devise upon the whole was of a trust executory, and that there was no objection to the limitation to the children taking place as an executory devise, though limited *per verba de praesenti*; for it appeared, that J. D. was very young at the time of the devise, and the testator's providing a maintenance for him until he should attain to the age of fifteen was a proof of his knowing that J. D. had no children at that time, it being entirely improbable that he should have children in being, when he was himself of so tender an age at the time of the devise. So that,

that, although the words were *in praesenti*, they must be taken in a *future sense* in order to serve the intent, which appeared manifestly to be that the children of J. D. should take; and therefore the will was executory.

So, where one devised to his wife for three years, remainder to his son; for ninety-nine years if he happened so long to live, remainder for one other term of ninety-nine years if *such woman as should be his wife should happen so long to live*, remainder to the heirs of his son's body and their heirs of their bodies; the Court held the devise to the heirs of the son's body good as an executory devise, being to take place *in futuro* within the compass of a life in being; which decision seems to have been founded upon the principle that the testator had a clear intention to provide for his son and his issue; and upon the evidence, afforded by the instrument, that the testator knew his son was unmarried at the time of the devise, and, therefore, must have intended a future devise.

Again, where a testator devised lands unto A. for the term of ninety years from his decease if A. so long lived, and, *after the determination of that term*, gave and devised the said lands unto the heirs of the body of the said

Doe v. Carlton.
1 Wils. 225.

Harris v. Barnes,
4 Burr. 2157.

A.;

A.; upon a question, Whether the heirs of the body of the said A. (who, when this point was agitated, had no heir of his body) took any and what estate under the said testator's will; which depended upon the question, whether the testator meant a present immediate devise to the heirs of the body of A.? The Court certified, that the clear manifest intent of the testator was, to give an estate tail to such person as should be heir of the body of A. at the death of A. (the only determination of the ninety years term in the testator's view) to him and the heirs of the body of the said A.

Vide case of
Bardett v.
Hopegood,
1 Will. 486.
Where child
in ventre sa
mere consid-
ered as a
child left, up-
on a devise,
in case one left
no son at his
death.

Secondly, as to civil persons.

Devisees may likewise be either civil persons in *esse*, or not in *esse*.

First, civil persons in *esse*; as executors, or the like.

Broke, tit.
Dev. 55.

Ibid. 77.

But parishioners are not such civil persons as are capable of taking lands as devisees thereof in that character. Therefore a devise of lands to the parishioners of D. is void.

Civil persons not in *esse* may likewise, under particular circumstances, be devisees, where the intent

intent of the devisor appears to be that they should.

As where a devise is to the executors of executors, in their civil capacity.

Every devisee, whether he be a natural person or a civil person, must be properly ascertained either by nomination, or by description ; for it is a known principle of law, that a devisee may be constituted as well by a description as by a Christian or surname ; nay, and even where there are mistakes or untruths in the description, as where the Christian name is mistaken, &c. if the person be sufficiently ascertained he may take.

First, by nomination, by proper names or surnames ; as a devise to A. B.—C. D. or the like.

Secondly, by description ; as by name of dignity, office, or the like ; *ex gratia* by devise of land to the Earl of *Hertford*, the Lord Treasurer, &c. So bishop of a certain place would be a good description of a devisee.

And where a devisee is ascertained by description, that description may be made good

by reputation, although it be not strictly true.

Dyer 323. Pl. 29.
S. C. Jenk.
Cent. 239.
41 E. 3, 13, et
vid. 2 Sid. 149.
39 E. 3, 24, et
vid. 3 Leon.
48.

As if A. devise that B. shall stand seised of land to the use of *Jane his daughter*; this would be a good devise to her, if she were reputed so to be, although she were a bastard and not so called by the will.

Rivers's case,
1 Atk. 410.

So where one, by will, gave an equal share of his real estate to his two sons, A. and B. one question was, Whether, as it appeared that A. and B. were illegitimate children of the testator, this was such a description of their persons as would intitle them to take under the will? *Et per* Lord Chancellor, in the case of a devise, any thing that amounts to a *designatio personæ* is sufficient, and though, in strictness, they were not his sons, yet, if they had acquired that name by reputation, in common parlance they were to be considered as such.

But this does not extend to a bastard born after a will made; for, the law will not expect that any such should be, nor will it give liberty or scope to provide for such before they come *in esse*; and a bastard cannot take by such description, unless he be such a person who is reputed a son, and none can gain that character by reputation at the instant

instant time of his birth, but it must be by continuance of time, and reputation of the country and not of the father himself. And then, if he cannot take as described at the time of his birth, he never afterwards shall take, for the law will not expect longer for the raising a reputation.

Thus the opinion of the greater part of the Justices in Serjeant's Inn on this point was, that a remainder to a man's first reputed son or bastard was not good; because the law did not favour such a generation, nor expect that such should be, nor would suffer such a limitation for the inconvenience that might arise thereupon.

So, where the Earl of *Devonshire* devised three thousand pounds to all the natural children of his son, the late Duke of *Devonshire*, by Mrs. *Heneage*; the question was, Whether the natural children by Mrs. *Heneage*, born after the will, should take a share of the three thousand pounds? *Et, per Curiam*, they should not; for bastards could not take until they had gained a name by reputation; and for this reason, it was said, that if a gift were to the issue of J. S. legitimate or illegitimate, yet a bastard should not take.

Blodwill vers.
Edwards,
Cro. Eliz. 509,
510. et vid Co.
Litt. 123. b.

Metham vers.
Duke of
Devonshire,
1 P. Will. 529.

Co. Litt. 3 b.

And the law is the same as to a bastard in *ventre sa mere*. Thus, it was a question in the preceding

Ibid 530.

case, whether a natural child of the Duke, by Mrs. *Heneage*, *in ventre sa mere* should take. And Lord *Parker* inclined to think that he could not; for that a bastard could not take until he had got a reputation of being such a one's child, and that reputation could not be gained before the child was born.

Hubb. 32. et
vid. 8 Rep.
73 a. the word
"Wife" in 32.
H. VIII. c. 28.
used to de-
scribe the per-
son, only, who
shall enter.

Vid. *Dyer* 337,
Pl. 36.
Hubb. 32.

A woman also may take as devisee by the name of *wife of such a one*, although she be not a law-
ful wife, if she be reputed or known by that
name.

And a devisee may also be constituted by names or designations that have an equivocal ambiguity in them; as *puer* for male or female. Yet if it be no way cleared up to the contrary, *puer* will, *prima facie*, be taken for a son.

*Cooper and
Lane's case,*
35 E*Hz.* cited
Style 293, sed
vid. *Moore*
104, 105. The
case was not
on a devise.

1 Roll. Abr.
837 Pl. 13. et
Archer's case,
1st Rep.
King v. Mel-
ling, 1 Vent.
225.

And so if a devise be *seniori puer*, and the testator have a son and a daughter; the devise will be good, and the son shall take thereby although the daughter be elder than the son.

So son, or eldest son of such a one, will be a good description of a devisee.

So a devisee may be described, as first and eldest son, *not heir at law*.

Thus,

Thus, where one devised lands to trustees, to hold to the use of them their heirs and assigns, to and for the only proper use and behoof of the first and eldest son of D. lawfully begotten, or to be begotten, *not heir at law or inheritor of the real estate of his father*, and to the third, fourth, fifth, and every other son or sons of the said D. and the heirs males of their bodies, *so as such son to whom such use was limited, were not heir at law or inheritor of the real estate of the said D.* remainder over: The question was, Whether G. D. second son of D. took any thing by virtue of this will? And it was objected that the words he claimed under, namely, "to the first and eldest son of D. "not heir at law to his father," were wholly uncertain and therefore void; for, the father was living at the time of the devise, and then he could have no heir at law, even the eldest son was exempt from that description. But Lord Hardwicke, although he would give no direct opinion, but only break the case, said *that*, as to the objection that the limitation made by the will was not good, because the description was so uncertain that the devisee could not take by it, he thought the objection had some weight; but, it was worthy of consideration, whether this limitation could be reduced to a certainty; for, if the intention of the testator could be found out, the court was obliged to follow it. That it seemed a

Marwood v.
Darrell, Ca.
T. Hardw. 91.

natural construction of the words, to conclude he intended the second son should take provided he did not enjoy his father's estate, and the proceeding directly to the third son, bore with it a very strong implication that this was his mind, as did also the proviso that he should not be heir at law to his father. It appeared, therefore, that such limitation might be made certain to the third son.

Perriman vers.
Pierce, Bendl.
102, 105, Harg.
Note Co. Litr.
10 b. reported
from Hale's
Miscel. but in
1 Palm. 11,
303. 2 Roll.
Rep. 256.
Bridg. 14. and
1 Eq. Ca. Abr.
212, 4. the
fact of the
younger
daughter being
living is omit-
ted, et vid.
(Dyer 373. 15.

And an elder daughter may take in preference to her sisters under the description of *proximo consanguinitatis et sanguinis* of the devisor. Thus where H. having a son and four daughters, viz. A. B. C. and D. devised land to the son in tail, remainder to B. and C. for life, remainder *proximo consanguinitatis et sanguinis* of the devisor; it was held *per totam curiam*, that it vested immediately on the death of the devisor in the eldest daughter only, and not in all the daughters, and did not wait the determination of the particular estate, and would at her death go to her heirs, because limited *proximo consanguinitatis*; for, although all the children stood in equal proximity, yet the elder daughter was the most worthy.

Ibid et per
Wilby, 30
Aff. 4. Bro.
Dev. 21.

But if A. the elder daughter, had died before the testator, then it would have vested in D. the younger daughter, B. and C. being excluded on account

account of the express estate limited to them, and D. being, at the time when the devise vested, daughter and consequently *nearer of blood* to her father than the grandchildren the heirs of A. because the former was the testator's own child, the latter were only children of the testator's child.

An elder daughter may take by devise, as a special heir by particular description. Thus in a case out of Chancery where E. devised lands to trustees, amongst other things, to raise 200*l.* for his daughter M. and, subject thereto, to pay the rents and profits to K. his wife for her separate use during her natural life, and, after her decease *to the use and behoof of the heirs of the body of the said R. lawfully issuing*, the *elder* of such issue and his, *her*, and their heirs to inherit and take place before the younger of such issue his, *her*, and their heirs, with remainders over. The testator left R. his wife surviving (who died soon after) and R. B. and M. his daughters and no other issue. R. B. entered on the residue and died leaving two daughters A. and J. and no other issue. And the question was, Whether J. took any and what estate in the lands devised? and *De Grey*, Chief Justice, observed, at the close of the first argument of this case, that there was no doubt of the testator's intention that the eldest daughter should inherit be-

Henry vers.
Purcel, 2
Blackst. Rep.
1002.

fore the younger, but how to effect that intention consistently with the rules of law was the difficulty. It had been held that the heir who takes by purchase may be a qualified heir and not heir general, then could not one of two sisters be considered as a qualified heir? and, after a second argument, the court certified, that A. took, in the first place, an estate tail in the whole of the lands, and that J. likewise took an estate tail in remainder, expectant on the determination of the said precedent estate tail, in the whole, with remainder over.

Wyld's case,
6 Rep. 172.

So a devisee or devisees may be constituted by the description of Child or Children. Thus where a devise was to W. and his wife, and, after their death, to their children; it was adjudged that the children of W. took only an estate for their lives.

Ibid 17 b.

And so it is if lands be devised to A. and to his children, A. then having children; the children, in that case, only take estates for life under the devise as a *descriptio personæ*.

Moore 20.
Pl. 39.

But where a man had issue a bastard, and afterwards married and had issue two sons, and then devised to his children: the better opinion seemed

seemed to be, that the bastard could not ~~take~~ by the will, in as much as he was *nullius filius*.

So if A. had issue three sons, and the eldest was a bastard, and a remainder was limited to the eldest issue of A.—the second son that ~~is a~~
<sup>W.M. Bladwell
v. Edwards,
Noy 35.</sup>
mulier should take and not the bastard: for in general words the construction shall be in *digniori sensu*.

But it is said that, if the mother of the bastard made such a devise, the bastard might clearly take, inasmuch as he was clearly known to be the child of his mother.

Moore 1o. Pl.
39. et vid.
Noy's Rep. 35.

However Lord Coke, in speaking of the statutes of the 32d and 34th Henry VIII. says, that when the statute of wills speaks of children, bastard children are not within the statute, and that the bastard of a woman is no child within those statutes where the mother conveys lands unto him. And Lord Coke's doctrine is agreeable to *Thornson's case* and *Woodhouse's case*, mentioned in a note there.

Co. Lit. 123 b.

Dyer 345.

And where a devisee is appointed by description, that description may be either general or special.

First,

First, General.

33 H. VI. 12.
a. b.

As where one devises lands to his wife for life, remainder to I. his son and the heirs male of his body, and if I. dies without heirs male, remainder to the next heir male of the devisor, and the heirs male of his body. Here the next heir male of the devisor is constituted devisee by general description.

No. 33.

So a devisee may be constituted by a devise to a stock, or family, or house, and it shall be understood of the heir principal of the house; for it is doubtful what is the precise meaning of the testator as to which of the stock, family, or house should be included as devisees: and, therefore, the case being doubtful, the law shall prevail, which always favours the heir, who is considered as the chief, most worthy, and eldest of the family.

Chapman's case,
Dyer 333 b.

Thus where C. seised in fee of three houses, devised *that* which N. dwelt in to his three brothers amongst them, and J. D. to dwell still in it, and they to raise no firme; and devised his house that T. C. his brother dwelt in to him, and he to pay C. C. an annuity *or else to remain to the house*; the words, " or else to remain to the " house " (i. e. family) were construed to mean

the chief, most worthy, and eldest person of the family.

Upon the same principle, if lands be devised to the *posterity* of A.—The lineal heir, if there be any, shall take them under the word *posterity*: but if A. die without issue and there be no lineal heir of A. the collateral heir of the whole blood shall take them.

Vid. 2 Eq. C₂.
Abr. 290, 7.

And a devisee may be described as the next of the name of the testator; and the next relation of his name, whether it be male or female, shall take as devisee described thereby.

Vid. Bon v*erf.*
Smith, Cro.
Eliz. 532.

So a devisee may be described as next of kin. Thus it was adjudged, where one devised lands in tail the remainder *to the next of kin of his name*, that his brother's daughter should take by that description.

Vid. Jobson's
c*a*le, Cro.
Eliz. 576.

And nearest relation of the name is likewise a good description of a devisee, and operates as *nomen collectivum*: and in these cases where *nomina collectiva* are used to describe the devisee, the term used comprehends all the testator's family that are nearest to him in the degree mentioned.

Thus,

Pyot vrs. Pyot,
1. Vez. 335.

Thus, where one devised her estate real and personal to trustees and their heirs, &c. in trust, first, for W. and her heirs for ever, provided that if W. died before twenty-one, or marriage, then in trust to convey, assign, and set over all the rest and residue of her estate, real and personal, to her nearest relation of the name of *Pyot*, and to his or her heirs, executors, administrators, and assigns. W. died under twenty-one and unmarried. At the death of the testatrix there were three persons then actually of the name of *Pyot*; namely, a man and his two sisters then unmarried, and also another sister originally of that name but married at the time of making the will. At the time of the contingencies happening there was also another person who was heir at law to the testatrix, and also of the name of *Pyot*, but more remote in degree than the others.

Ibid.

Pyot, the heir at law, insisted, first, that this devise to the nearest relation was void for uncertainty, because the word Relation was not *nomen collectivum*; for no words were of that description except such as had no plurals, as *stock*, *beir*, or the like. Secondly, that if it was not void, then the heir at law was the person meant by nearest relation; that the testatrix had in view a single person, and could not intend to give it to all her relations. But Lord *Hardwicke*, Chancellor, said, that a devise was never to be construed absolutely void.

void for uncertainty unless from necessity. Then the question was, Whether there was such uncertainty in this devise over ; and, if there was a necessity to take this to relate to a single person, it would be so, as there were several in equal degree of the name of *Pyot*. But his Lordship did not take it so : the term "*Relation*" was *nomen collectivum* as much as heir or kindred. Suppose it had been to the nearest kindred of the name of the *Pyots*, that was the singular number : and though his Lordship admitted that this word *kindred* was used as *nomen collectivum* oftener than the other, there being no plural to it, yet he said, he had seen it used in the plural in incorrect writings. In common parlance, *Relation*, in the singular number, was used as *nomen collectivum* in the same sense as kindred, and no difficulty arose from the word *bis* or *ber* in the case any more than where the word Heir was used. He said he thought the *Pyots* described a particular stock, and the name stood for the stock : but yet it did not go to the heir at law as in the case in *Dyer*, because it must be nearest relation taking it out of the stock ; from which latter case it also differed, as the personal was involved with the real estate, and it was meant that both should go in the same manner. Then should the personal go to the heir at law? In such case all persons in equal degree of the name of *Pyot* would be intitled to take equally ;

equally; for the court being upon a question of construction who were the persons designed to take, the involving the personal in the same trust and devise as the real estate was a circumstance determining the construction as to the real estate; *that* affording a proper key to find out who were the persons designed to take under this description, for the testator must have had but one intention. This then plainly took in the plaintiff and his sisters unmarried at the time of making the will, although married before the contingency.

And if the devisor explains who he means by nearest relation, persons may take under that description who are not strictly so circumstanced in point of kindred.

Greenwood v.
Greenwood,
cited Brown's
Ca. Chan. 32.

As if lands were devised to be divided between the nearest relations of the testator; namely, the *Greenwoods*, the *Everetts*, and the *Downs*. The *Everetts* it seems might take, though not in the same degree of relation as the *Greenwoods* and *Downs*, nor within the degree of nearest relationship.

Vid. Davies
vers. Bailey,
1 Vez. 84.
Worsly vers.
Johnson,
3 Atk. 759,
761.

If one, being married, make his will, and thereby describe his devisee by the term Nearest Relation according to the statute of distributions,

his

his wife cannot take thereby; for she is no relation to her husband in the sense in which that word is here used, because it is transferred to a personal sense, and as if he had said kindred; and kindred, in the statute, means kindred by blood only, and the wife is no relation by blood or affinity. *Non affinis est sed causa affinitatis; affinis ab eodem scripte.*

Skinner tit.
Cognatia Pa-
rentela,
Calvin's Lexi-
con, tit. Affi-
nitas.

And there would be no difference in such a case as that last mentioned, whether the terms used by the testator were, My relations generally, or, My own relations. In both cases, relations by blood only are included. And if the reference to the statute of distributions be omitted in such a devise, the wife cannot even then take within the description of a near relation. For, in the case of *Thomas and Hale Lord King* determined, upon the authority of Lord *Macclesfield* in the case of *Brown and Brown*, that the word "Relations" should be confined to such relations as were within the statute of distributions, because of the uncertainty of the word Relations; yet, it is observable that the question there arose respecting personal property, and, therefore, from the nature of the subject matter, furnished a ground for resorting to that statute to determine what the testator meant, which was one ground of Lord *Hardwick's* judgment in *Pyot and Pyot*.

² Eq. Ca. Abr.
332, 9. 368.
¹³ Ca. T. Tal-
bot, 251.

But

But there seems to be no reason, in case of a devise of land so conceived, for referring to that statute, thereby to decide upon a term applied to a subject to which that statute has no reference, unless it be, that, the question being of a testamentary nature, any decision upon a testamentary subject should be referred to from whence to draw an analogy, rather than the evident intent of a devisor to give should be disappointed, upon the foundation of his having expressed himself with an uncertainty not to be cleared up: therefore it seems very questionable what would be the fate of a devise of lands only to the relations of the devisee.

Bon v. Smith,
Cro. Eliz. 532.

A question was put to the court by *Glanville, Serjeant*, Whether, where a man had issue a son and a daughter, and devised his land to his son in tail, and, if he died without issue, that it should remain to the *next of his name*, and died, and the son died without issue the daughter being then married, the daughter should have this land? *Et, per curiam*, she should not, for she had lost her name by her marriage.

Ibid 576.

Supra 347.

But this seems to depend upon the time of the marriage: for, in *Jobson's* case, which was also a devise of lands in tail the remainder to the next of kin of his name, the next of kin at the time of the

she devise was his brother's daughter, who was then married to J. S.—And, on the death of tenant in tail without issue, the question was, Whether she should have the land? and, although it was held that she should not, because she was not then of the name of the devisor; yet it was said that, if she had been unmarried at the time of the *devise and death* of the donor, she should have had the land notwithstanding she had been married at the death of tenant in tail.

And, in this respect, a distinction was taken by ^{Supra 348, 350.} Lord Hardwicke in the case of *Pyot and Pyot*, between that case and *Jobson's* case last cited; it arose *on the claim of* the sister, who was married *at the time of* making the will upon which that case was agitated. And his lordship said, that, as to her claim, he was not satisfied with the resolution in *Jobson's* case, and thought it was a very odd one; for, in such a devise, there was no regard had to the continuance of the name. But he said that case differed from the present. The remainder there to the next of kin of the name was not a contingent limitation over upon a fee devised precedent, and, therefore, might be referred to the time of making the will; but, in the case then in question, the description of the person must refer to the time of the contingency happening, viz. such as at the time of that event should be

the devisor's nearest relation of the name of *Pyot*. Then taking the word Relation to be *nomen collectivum*, as he did, there was no ground to construe this description to refer to the actual bearing the name at the time of making the will; but it must be construed to refer to the stock of the *Pyots*. If it referred to the name, suppose a person of nearer relation than any of those then before the court, but originally of another name, changing it to *Pyot* by act of parliament; he would not come within the description of nearest relation of the name of *Pyot*, for, that would be contrary to the intention of the testatrix, and yet the description was answered, he being of the name of *Pyot*, and perhaps nearer in blood than the rest. Suppose a woman, nearer in blood than the rest, and marrying a stranger in blood of the name of *Pyot*, that would not do; yet, at the time of the contingency, she would be of the name. In *Jobson's* case, "and in that of *Bon* and *Smitb*, (which was a case put at the bar by Serjeant *Glanville*, as was often done in those times, but could not be any authority) it was "next of kin of my name," which was a mere designation of the name, but it was expressed differently in the case then before him: it might be a little nice, but he thought the *Pyots* described a particular stock, and the name stood for the stock. And his lordship thought, upon the whole, that the sister,

who was married at the time of the will, was equally intitled to take with the others, the change of name by marriage not being material, nor the continuance of the name regarded by the testatrix.

Again, where A. devised land to his wife for life, remainder to T. his son for life, so that the said T. might not give nor alien so as to prevent the land from remaining *propinquioribus bæredibus de sanguine paerorum* of the said A. it was adjudged, that the children of A. should not inherit the remainder by the words, " *propinquioribus, &c.*" because the limitation was not to the heirs of the testator, but to the nearest of blood of the children; so that the infants themselves were precluded from having the lands by the remainder.

30 Att. Pl. 47.
Bro. Dev. 21..

It having been, during the prevalency of the feudal system, a fundamental principle of our law, that an heir should not take a contingent remainder of an estate as a purchaser, where his ancestor took a freehold estate by the same conveyance; because such dispositions, while fiefs were predominant, tended to defraud the lord of the fruits of his tenure, by enabling the heir, with the concurrence of his ancestor, to take the estate as fully as by descent without the feudal

burdens to which he would have been liable had the estate descended; it became a rule of construction, applicable to all instruments so conceived, that the estate limited to the heir, though meant to be contingent, should, in law, be considered as vested in the ancestor: in consequence of which conclusion of law every devise, in which an estate of freehold or frank-tenement was given to the ancestor with an immediate or mediate remainder thereon limited to his heirs, or heirs in tail, or issue, (the latter term being considered in a devise as a word of limitation, and synonymous to the word heir) was considered as furnishing incontrovertible and conclusive evidence of an intent in the devisor, to give an estate in remainder, immediately executed in the ancestor so taking the freehold and not contingent in the heir or issue; such a limitation being considered *technically* as importing an intent in the devisor so to convey. And, although, by the abolition of tenures, the foundation upon which the principle was adopted, which gave rise to that rule of construction, failed, yet, the technical import of such a limitation being established, the construction of the instrument continued the same, the presumption being that the words were used, notwithstanding tenures had ceased, in their common and ordinary acceptation. It follows, consequently, that the words **Heir or Issue**, when so used

used in a devise, cannot take effect as a description of the person to take *as a purchaser.*

But, although the alteration of the state of the subject to which the words in such a devise applied, was held not to furnish a reason for altering the construction of such limitations, the language that constituted them having gained by usage a fixed technical import; because such an alteration would have been productive of more mischief by the confusion that would have followed in men's ideas respecting the disposition of their estates, than could have been compensated for by any benefits that could have arisen by departing from this rule; it by no means followed that, when the foundation of the principle upon which the rule was grafted failed, the rule that had been raised thereupon should be extended beyond the precise limits it had at that time reached. From that period, therefore, courts of law and equity seem to have been as industrious to take devises out of that rule of construction in favour of a contrary intent, where that intent is *clear* and must *necessarily* be collected from the devisor's language, as they were astute in their endeavour, by construction, to bring cases within that rule, while the principle of it continued to operate. It follows that the issue or heirs of a devisee may now take, under *that* description, contingent remainders as purchasers,

notwithstanding a previous freehold is limited to their ancestors by the same devise, if there be language so modifying and qualifying the limitation as to make it not quadrate exactly with the rule. But such limitation will conclusively be considered as so doing, unless it be so conceived as necessarily to import an intent in the devisor, that his devisee in remainder shall take an executory estate as an original purchaser of a contingent remainder, and not an estate in remainder executed through the medium of the ancestor; which it is still concluded to be a devisor's intent to give, wherever an estate of freehold or frank-tenement is limited to the ancestor with an immediate or mediate remainder thereon to his heirs, or heirs in tail, or issue, unqualified with other restrictive words necessarily importing a different estate to have been intended.

A devisee therefore may now be described by the words "Heir" or "Issue" of one who takes a previous freehold by the same devise, if the testator plainly shew that the term "Heir" or "Issue" was meant by him to be understood as a *descriptio personae*.

Thus, in *Haddon's case*, where he devised to one for life, and so afterwards to every person that should be his heir for life only; it was adjudged in the Common Pleas to carry an estate

in

in possession to the tenant for life, with a remainder for life to the next heir, and nothing more.

So a devise of lands to J. S. and to his *eldest* issue male, he having no son at that time, was adjudged not to be an estate tail, but for life only. And it was said that it would have been all one if he had *bad* a son.

Lovelace *vers.*
Lovelace,
Saville 75.
Cro. Eliz. 40.
2 Leon. 35.
6 Rep. 17 b.
Moore 121.
2 Bulst. 180.

But if the limitation in *Haddon's case* had been to A. for life, and after to every person who should be his heir, *one after another*, for the term of the life of every such heir only, it would have been void; for, if it had been good, the inheritance would have been in nobody, and that would be contrary to the rules of law, so note the distinction.

Supra 352

The same point was adjudged as to the words "Issue Male" being a good description of the person of the devisee in the case of *Luddington and Kime*, where A. devised lands to B. for life without impeachment of waste, and, in case he should have any issue male, then to such issue male and his heirs for ever. Here the subsequent limitation to the issue male of B. was held not to make him tenant in tail, but to be a contingent fee to his issue male, who took by way of purchase as a devisee specifically described.

Luddington
vers. Kime,
1 Salk. 224.
L. Raym. 203.
3 Lev. 435.

Backhouse v.
Wells, 1 Eq.
Ca. Abr. 184.
Pl. 27.

So where the limitation was to one for life *only*, and after his decease to the issue male of his body and to the *beirs male of the bodies of such issue*, the word "Issue" was considered as a description of the person who was to take the estate tail.

Vide Strange
731. 1 Rep.
103 b.
1 Anders. 132.
Cro. Eliz. 40.
Moore 371.

The principle upon which these cases are considered as not falling within the rule before-mentioned seems to be, that the word Issue, being in its most proper and technical sense descriptive of the person, and only taken as a word of limitation to effectuate the intention of a testator, (though it shall be taken in the same sense when it militates against his interest, as it shall be taken in when it operates in favour of his interest, where it is used in the same manner, and, therefore, shall be considered as a word of limitation as well where the consequence is to give effect to proceedings that destroy his estate, as where the consequence is to give effect to his claim against any act of the tenant for life, which would, if it were considered as contingent, militate against his interest) yet, it shall, when it is evident from the testator's manner of expressing himself that he meant to use it in its proper sense, viz. as a description of the particular person to take and not as *nomen collectivum*, take effect in that sense and in no other. Now, where a testator superadds words of limitation upon the word "Issue," it may fairly

fairly be inferred, that he did not use the word "Issue" in its collective sense, for, if he had, it would have embraced that description of persons, to include which he has used the latter words of Limitation superadded. The word Issue, therefore, in such case, is understood in its common and ordinary signification; *i. e.* as a description of the person to take.

And this accounts for the distinction between a description by the words "Heir" or "Heir Male" and by the words "Issue Male," when accompanied with such superadded words of limitation; for the words "Heir" or "Heir Male," (being, according to their proper technical import, words of limitation, *i. e.* *nomina collectiva*, and never taken as words of purchase, *i. e.* *a descriptio personæ*, except to answer the evident intent of testators) will not be restrained to the latter signification by merely superadding other words of limitation; for such other words are only a repetition of what is before expressed by the words, "Heir" or "Heir Male" in their technical import, because they include the subsequent words of limitation, viz. "And his Heirs" or "the like," for every heir male of the body of the heir is, in construction of law, an heir of the ancestor himself; for which reason the words added are considered as words merely declaratory,

Vid. Duhber
vers. Trollop,
cited i Atk.
412.

King vers.
Burchel,
3 Burr. 1103. declaratory, and do not restrain the effect of the former words; and therefore where lands were devised to J. H. for life, then to the heir male of J. H. *and his heirs*, and, for want of such issue, then over; Lord Keeper Henley held that J. H. took an estate tail, notwithstanding that the words Heir Male were in the singular number, and attended with superadded words of Limitation in Fee.

Miller vers.
Seagrove,
Rob. Gavelk.
96, et vid.
1 Vez. 337. And where there was a devise to M. and his wife for their lives, remainder to the *next* heir male of their two bodies, it was held a devise in tail.

Trollop vers.
Trollop, Rob.
Gavelk. 76.
1 Atk. 412.
Et vid. Good-
rightvPulleyn,
2 L. Raym.
3437. So where the devise was to one for life, and, after his death, to the *first* heir male of his body remainder over; it was held that the first devisee took an estate tail.

The foundation of all which cases appears to be, that neither words of limitation superadded on the word "Heir" in the singular number, nor the words *first*, *next*, or *eldest* preceding the word Heir, are sufficient to shew an intent in the testator to controul its technical import; for, neither of them furnish a ground from which it must necessarily be inferred, that the testator meant to use the word Heir out of its ordinary sense,

sense, in which it operates *universally* as *nomen collectivum*; because if words of limitation only be superadded, it is merely *expressio eorum quæ tacite insunt*; for the word "Heir" imports the heirs of such heir; so the words *Next*, *First*, or *Eldest*, when preceding the word "Heir," only express that which the word "Heir" itself implies, viz. *First*, *Next*, or *Eldest*, taken for the future time, the one to succeed to the other from time to time, according to the course of the common law. Consequently a devisor may use either of these expressions without any intention to alter the technical import of the word to which they are joined.

But the word "Heir" may also operate as *descriptio personæ*, whereby a testator points out who shall be his devisee, if he add words to the term Heir, from whence it *must* be *necessarily* implied that he meant to use it in that sense. And, therefore, where a limitation was to A. for life, and after to the *next* heir male of the body of A. and *to the heirs male of the body of such next heir male*, the devise to the *next heir male* was held to be remainder vesting in him by purchase; because, if the words "*next heir male*" were taken in a collective sense, the superadded words of limitation, viz. "*And to the heirs male of the body of such next heir male*," must have been rejected;

Minshul *ver.*
Minshul,
1 Atk. 411.

Chapman's case
Dyer 333 b.

Sed vid. Cheek
v. Day, Moore
593. 2 Roll.
Abr. 417. G.
Pl. 7. Cro. Eliz.
212. Ow. 148.
cited L. Raym.
205. Fitzgibb.
24.

Archer's case,
1 Rep. 66.

rejected; and if the words "heir male of the "body of A." had been taken in its collective sense, both the words "next" preceding the word *Heir* and the subsequent limitation must have been rejected; and the limitation, being to the next heir male, could not give the fee-simple to the ancestor, and an estate tail in the ancestor would not answer the superadded words of limitation to the heir: besides which, the words of limitation superadded are particular; for, in them, the testator shews that he had a different idea of the effect of the terms "next heir male" in the singular number from that which he had of the effect of the terms "to the *beirs* male "of the body, &c." in the plural number, or otherwise he would not have expressed himself in the superadded limitation in the plural number; therefore, the words, "to the *beirs* male of the "body of such next heir male," preclude the objection to the uncertainty of the testator's intent, which exists in the former cases put; because, it is limited "to the next heir male of A. and to "the heirs male of the body of such next heir "male," which, in other language, is tantamount to a limitation "to the next heir male of the "body of A. and his heirs male," in which mode of expression the words "his *beirs*" would shew that the word *next* was meant to confine the word *Heir* to a particular person; in like manner

manner as in the preceding case of *Luddington* Supra 359.
and Kime, the words "his heirs" were considered
as explanatory of the intent of the testator to use
the word Issue in a sense applicable to *one* issue
only.

Secondly, A description of the devisee may be
special, operating as an actual description of a
particular person.

As a devise by these words, "I give the fee-
" simple of my house in C. to my cousin A. L.
" and, after her decease, to W. L. her son,"
(which W. L. was her heir apparent.) Here
A. L. had an estate for life remainder to W. L.
her son for life by special description, remainder
to A. L. in fee.

Chvcke's case,
Dyer 357.

So, where a man devised lands "to A. and his
" heirs during the life of B. in trust for B. and,
" after the decease of B. to the heirs males of the
" body of B. *now living*," B. having one son then
living. By this devise a remainder was immedi-
ately vested in the son; for, the words "*heirs males*
"*NOW LIVING*" in a will were a full description
of the son, who then was the heir apparent of B.
and known by the devisor to be so.

James vers.
Richardson,
T. Jon. 99.
1 E. Ca. Abr.
214, 11. S. C.
1 Vent. 334.
2 Vent. 321.
by names of
Burchet vers.
Durdant,
Raym. 330.
3 Keb. 32.
Poll. 457.

Again where one made his will and devised his
estate to trustees, in trust that his daughter might
receive

Trafford et ux.
v. Ashton et
al. 2 Vern.
660.

receive the profits for life, remainder to the *second son* of her body to be begotten in tail male, &c. The daughter married, and had a son Edmund, who died in twelve months after his birth, and, after his death, a second son Richard, who lived to eighteen and died without issue: The question was, Whether Richard, not being born till after the death of Edmund, was a *second son* within the intent of the will? and the Lord Chancellor was of opinion, that Richard was a second son and must take, although it did not accord with the testator's design; but, as the will was worded, he could not be excluded. The *second son* was the *second* in order of birth.

Ibid. And it is observable, in the last case, that there were negative words in the will, viz. "that "he did not by his will devise the estate to the "eldest son, because the testator expected his "daughter would marry so prudently as that the "eldest son would be provided for." But even these were not sufficient to exclude Richard, who was the second son by birth, though afterwards he became eldest.

¶ Vern. 733.

So if a man devise to his heirs in borough English, or to his heirs in gavelkind, such special heir shall take, although he be not heir general at common law; because he is specifically described,

scribed, and distinguished from the heir general at common law.

But, it being necessary to the constitution of a devise, that there be a devisee certain or capable of being made so; the law requires every one, claiming in that character, to answer in all respects the description the devisor has given.

Thus, if one claim under the description of heir, he must shew that he is heir in that sense in which the testator has used the term.

Now an heir may be in four ways.

First. Heir with relation to the ancestor of the person so described, as heir general.

Secondly. Heir by particular description of the testator, as heir special.

Thirdly. Heir with relation to property, or to the thing to be inherited.

Fourthly. Heir by inference.

First. Heir with relation to the ancestor.

And, in this view of an heir, one cannot make another heir unless he be strictly so. Therefore,

the

Jenk.Cent.203. the word "heir," in this sense, will not serve for a name of purchase, if the person claiming be not lawful heir. Consequently, where A. devised that the heir of B. should sell his land, and B. was attainted of felony in the life-time of A. and then A. died, the eldest son of B. could not sell the land; for he was not heir, because the blood was corrupted.

*Collingwood v.
Pays, 1 Sid.
193.*

So where one, seised of lands in fee, by devise "gave unto the heir of his brother N. and to "his heirs for ever, all those his manors of M. "and T. upon condition to pay debts, &c." N. the brother was an alien; and one question was, Whether this was a good devise? And, as to this, it was held, *per totam Curiam*, that it was a void devise; because there can be no devise if it be not known whom the devisor intends; then when he said "the heir of my brother N." N. being an alien, there was no such person as his heir; for, though every alien might have sons, no alien could have an heir; for, *filius est nomen naturæ, sed bæres nomen juris.*

Jenk.Cent.203.

And the law would have been the same, if the word Issue had been used to describe the devisee.

Secondly,

Secondly, Heir by particular description of the testator ; which may be either of Heir general or heir special.

Since, wherever a testator describes his devisee as *heir* of any one *generally*, none can take under that description unless he fully answer it in all particulars ; it follows that none can take as such during the life of his ancestor ; for, *nemo est heres viventis.*

Supra 367, 368

Therefore where one, having issue two sons and two daughters, devised his lands to his younger son in tail, and for want of such issue to the heirs of the body of his eldest son, and if he died without issue, that the land should remain to his two daughters in fee. The testator died, the younger son died without issue living the eldest son, who had issue him who was tenant in the assize. It was contended that, notwithstanding that by way of grant the son, living his father, cannot take as heir (*i. e.* by limitation as heir to his father) because none can be said to be heir to his father *as long as his father be alive*; yet, by way of devise, the law should favour the intention of the party, and the intent of the deviser should prevail. But the Court were unanimously against it, and held, that it

Challoner v.
Bowyer,
2 Leon. 70.
S. L. Dyer 99 a.
Pl. 64.

was all one in the case of a devise as of a grant.

¹ Rep. 66.
Archer's case.
Supra 363.

So, where lands were devised to A. for life, and, after, to the next heir male of A. and the heirs male of the body of such next heir male; A. having issue a son, made a feoffment to B. upon whom the son entered; and it was adjudged, that the entry of the son was not lawful, for the remainder could not vest in him living his father; because it was limited to the next heir male of A. and A. could have no heir male during his life.

Upon the same principle as that upon which the preceding cases are determined, it is held that, if a testator describe any particular heir, as heir male, or heir female, or heir of his name, or the like, the person to take thereby must answer the description in both particulars (*i. e.*) he or she must be very heir, as well as male or female, or of the testator's name; because these words operate on the first taker as a *description persona, and name of purchase.*

Vid. Bro. Abr.
ut. Done 61.

Ashenhurst's
case, cited
Hob. 34.
² Roll. Ab.
416. F. Pl. 5.

Thus, where B. having issue three daughters, devised hereditaments to his wife for life; remainder, after her death, to his executors until out of the profits they had received a certain sum

sum for preferment of his daughters; and, *then*, the hereditaments to remain to his *right* heirs *males* for ever; and if his heirs males should disturb his executors in receiving the profits, that then their estates should cease, and the land should be divided among the daughters then living, and died. W. B. was found to be heir *male* of the testator. But the Court of King's Bench held, that he could not take the remainder, because the three daughters were the heirs *general*; and this judgment was affirmed in the Exchequer Chamber.

So, where W. C. seized of the lands in question, had issue a son and a daughter, and the daughter married D. by whom she had issue two daughters, J. and E.—W. C. by will, devised an annuity out of the said land to his grandchildren J. and E. and £.20 legacy to G. C. his own brother, and then devised the lands to his son for life, and, if he died without issue of his body, then to go unto his *right* heirs of his name and posterity; *equally to be divided part and part alike*: And the question was, Whether the devise unto the right heirs of his name and posterity was a good devise to his brother, who was of his name? And one point ruled was, that it should not go to his brother, because, though of his name, he was not heir, for, the issue of the daughter was heir.

Counden v.
Clerke, Moot
860. S. C.
Hob. 29.
Jenk. Cent.
294.
Ford v. Lord
Ofulston, Mich.
7 Anne, cited
Harg. Note
Co. Litt. 28 B.
29 a. Dawes
v. Ferrars,
2 Wils. 1.
Vin. Abr. Dev.
W. b. in a note
on Placito, 18.

And the rule of law is the same as to trust estates so devised.

Starling v.
Ettrick, Pre.
Ch. 54
Trin. 1695.

Thus, where S. conveyed estates to trustees and their heirs, upon trust to convey the same, and any, or every part thereof, to such person, and for such term, time, and estate, as he, by his last will and testament in writing, should direct, limit, and appoint, and, for want of such appointment, &c. and afterwards, by will, devised to S. S. his nephew some houses, but he was only to have £:50 out of them till his age of twenty-four, and, if he died before twenty-four, that then the trustees should convey the said houses to the right heirs male of S. and for default of such heirs male, to *the right heirs of S. for ever*; and did appoint, that the said trustees and their heirs should, within six months, &c. convey the manor of D. to his nephew, R. S. (who was his heir at law) if he should then be living for his life only, or, if he should be dead, to his heir male, to hold to him and his heirs male for ever, and for want of such issue, to his own right heirs for ever. S. died leaving R. S. his heir, who died leaving issue I. *a daughter*. Afterward S. S. the nephew, and S. his son, filed a bill against the trustees, insisting, that either S. S. the nephew was intitled as right heir male of S. or else S. the younger as heir male of S. S. the nephew:

nephew: And it was contended, on the part of the plaintiffs, that this, being the case of a trust and a will, ought to have the most favourable construction; then it was very plain, that the testator intended his estate should be continued in the name, and go to the males of the family; that this was not the limitation of an estate, but a direction to the trustees to make a conveyance; and that *right heir*, in this case, should be understood to mean *heir apparent*. But the Lord Keeper dismissed the bill, and decreed the trustees to convey to the defendants, I. and *her* husband, the heir general, as right heir of S. according to the will, they having filed a cross bill for that purpose.

But, if the testator clearly shew by positive words, or, if it must necessarily be inferred from facts, that he meant one to take by the description of a *particular* heir, who was *not* general heir; that intent will be carried into execution.

As if one devise in these words, "I give to ^{Hob. 34.} my heir male, *which is my brother A. B.*;" this will be a good devise to A. B. although the testator have a son who is heir general.

Hob. 34.

So, if a man, having a house or land in Borough English, buy lands lying within it, and then, by his will, give his new purchased lands to his heir of his house and land in Borough English for the more commodious use of it ; such heir in Borough English will take the land by the devise as *bæres factitiores*, or *fatus*, not *valus* or *legitimus* ; for, the intent is certain and not conjectural.

Cited Rybus v.
Miford,
& Vout. 372.

So, in the case cited by Lord Hale, where a man, having two daughters and a nephew, gave his daughters 2,000*l.* and gave the land to his nephew by the name of his heir ~~title~~, provided that if his daughters troubled the heir, the devise of the 2,000*l.* should be void ; the devise to the nephew was adjudged good, although he was not heir general ; because the devisor expressly took notice, that his three daughters were his heirs, and thereby shewed his intention to exclude them.

Baker v. Wall.
1 L Raym. 185.
S. C. Pre.
Ch. 468, 447,
464, 465,
1 Eq. Ca. Abr.
214, 12.

Again, where one, having issue two sons, made his will, and thereby " devised to D. " his eldest son, his farm called Dumsey, to " him and his heirs male for ever ; if a " female, my next heir to allow and pay to " her 200*l.* in money, or 12*l.* a year out " of

* of the rents and profits of *Damsey*, and shall
 " have all the rest to himself; I mean my next
 " heir, to him and his heirs males for ever." The devisor died, and D. the son entered and died leaving issue J. D. a daughter, and then the younger son entered into the land in question; and the question was, Whether the younger son was intitled? And the Court held that he was; first, because it was manifest that the devise to D. was an estate tail male; secondly, that it was apparent that the devisor had a design that if D. had a daughter, she should not have the lands; for the words, "if a female, then my next
 " heir," &c. must be intended, as if he had said, But if my son D. shall have only issue a female, then that person, who would be my next heir if such issue female of D. was out of the way, shall have the land. And, to make his intent more manifest, he gave a rent to such female out of the lands, which demonstrated that he had no design that she should have the land, for she could not have both the land and a rent issuing out of the land; and if the intent of the devisor was apparent, and it did not contradict the rules of law, it ought to be pursued. Then when the devisor said, "I mean my next heir
 " to him, &c." by the words "to him" which were of the masculine gender, it was apparent that he intended the male heir, and the

words "to him" were tantamount to the word *male*; so that it was the same thing as if he had said, "I mean my next heir male." And, as to the objection that I. was male but not heir, for J. D. a female was right heir to the devisor; the Court said that, if the party take notice that he has a right heir, and specially exclude him, and *then* devise to another by the name of Heir, this shall be a special heir to take.

And, upon the same principle, one may take by special description as heir, even in the life-time of his ancestor, if the testator evince his intent so to be; as if he take notice, *that the ancestor is living*.

Darbison on
Dem. Long
v. Beaumont,
1 Will. 229.
1 Brown Parl.
Ca. 489. et
vid. supra 365.
James v.
Richardson.

Thus, where S. after devising hereditaments to trustees for twenty-one years for the payment of debts, &c. settled the same on the first son of his body lawfully begotten, and the heirs male of the body of such first son lawfully issuing, and, for default of such issue, to his cousin J. S. for ninety-nine years, if he should so long live, remainder to his first and other sons in tail male, and, in default of such issue, remainder to the heirs male of the body of the testator's aunt E. L. lawfully *begotten*, and, for default of such issue, remainder to his own right heirs. The testator also gave a legacy to his said aunt

E. L.

E. L. whereby he took notice, that she was living, and that she had three sons, A. B. and C. to whom he gave a legacy of 500*l.* He likewise gave to D. B. who was his heir at law, an annuity out of the said hereditaments of 150*l.* per annum, and to her children 500*l.* a piece. Afterwards the testator died without issue, as did also J. S.; upon which the question was, Who was intitled to the testator's real estate, whether his heir at law D. B. or A. the eldest son of the testator's aunt E. L.? And one objection taken to the claim of A. was, that E. L. his mother being living at the testator's death, there was no *beir* of E. L. nor could be whilst she was living; and that *Heir*, being a legal term, could be understood only in a legal sense, unless some other word or words accompanying it should determine the sense otherwise, as *beir apparent*, or *heir now living*; and it was said, that the word *begotten* did not determine the sense to be special; because the word *begotten* or to be begotten, had the same legal construction; and it did not appear that the devisor had any intention to confine the devise to the issue male of E. L. then living, much less to A. only, who would take as the heir described by this devise. But it was adjudged in the Exchequer, which judgment was afterwards reversed in the Exchequer Chamber, and that reversal reversed in the House of Peers, that A.

was intitled under this devise: and the principal reasons upon which the Court of Exchequer founded their judgment; and upon which the House of Lords affirmed it, were, because it was evident from the whole will, that he was the person *manifestly* designed to take by the application of the *heir male* of the body of the testator's aunt. E. L. lawfully begotten, before the heir general of the testator, who was to take no more *than an annuity* so long as there should be issue male of his aunt; and then, although the word Heir, in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living. Then, when the testator also took notice, that E. L. the ancestor was living at that time, and gave her a legacy, he could not intend that the first son should take *strictly* as heir, which was impossible if *she* was living, but, as heir apparent he might intend him to take.

Gordright on
Dem. Brook-
ing v. White,
2 Blackst.
Rep. 1010.

Again, where B. devised to M. his wife, *inter alia*, an annuity of 10*l. per annum* charged upon the estates in question for eighty years if she so long lived, on condition that she claimed no dower; and, after the decease of M. his wife, devised annuities of 40*s. per annum* each to his daughters E. N. M. T. and A. H. for ninety years,

years, if they should respectively so long live; also to his daughter M. W. the wife of W. another annuity of 40 s. per annum for seventy years, if she and the testator's only son R. B. should jointly so long live, the said term of seventy years to commence at the expiration of the term of two years thereafter given in the estates to his said daughter M. W. and the death of M. his wife, and, subject to the same annuities, gave the estates to his daughter M. W. for two years from and after his decease, with remainder to R. B. his son for ninety-nine years if he so long lived, and, subject to such ninety-nine years term, he devised the same to his son R. B. and his heirs male and to the heirs of his daughter M. W. jointly and equally, to hold to the heirs male of R. B. lawfully begotten and to the heirs of M. W. jointly and equally, and their heirs and assigns for ever; and, for want of heirs male lawfully begotten of the body of the said R. B. at the time of his decease, he devised the same, charged as aforesaid, to the heirs and assigns of the said M. W. lawfully begotten of her body, to hold to the heirs and assigns of the said M. W. for ever. He then devised a leasehold house to his daughter J. S. and made his daughter M. W. sole executrix and residuary devisee of all his personal and real estate. The testator died, leaving M. his widow, since deceased, R. B. his only son and

and heir, and five daughters viz. M. I. E. A. and M. W.; and R. B. the son had, at the time the will was made, a son R. and two daughters; and M. W. the testator's daughter then had one son, and, after the testator's death, she had another son, both living, and no other children. On the death of the testator, M. W. entered into the whole of the estate, and held the same for two years, after which R. B. the son entered, and held the whole during his life. R. B. died, leaving his only son R.; upon which M. W. entered into the whole of the estates: And, on an ejectment brought by G. on the demise of R. son of R. B. against M. W. the question was, Whether the plaintiff was entitled to recover? And it was contended, that R.'s devise to the heir of M. W. in the event that had happened was void; for, at the expiration of the particular estate by the death of R. the son living the daughter M. W. nobody could take as heir of M. W. for *nemo est bares viventis.* But, by *De Grey*, Chief Justice, the question is, Whether here is a *sufficient description* of the person to make the son of M. W. take as *her* heir living *the mother.* The intention of the testator is clear, that the same favour should be extended to the heirs of M. W. as to the heirs male of the body of R. He took notice that the daughter was living, by leaving *her* a term and a subsequent annuity,

annuity, and meant a present interest should vest in her heir, that was, her heir apparent, during her life. He therefore did not think the lessor of the plaintiff was intitled to more than a moiety of the estates. *Gould*, *Blackstone*, and *Nares*, Justices, were of the same opinion. *Blackstone* thought that, as the testator had varied the tenure of M. W.'s annuity from that of the three other sisters, *their's* depending on their own single lives, and *her's* on the joint lives of herself and her brother R. it was plain the testator had in his contemplation that *she might survive R.* as, in fact, she did; and, therefore, the word, *heir* must be construed as equivalent to *issue*, in order to make him take in her life-time, agreeable to the intent of the testator.

But there were formerly great doubts entertained, whether, if an estate were given to one, remainder to the heirs male or female *of his body*, it would be necessary that the person to take should be *heir* as well as *male* or *female*; or, whether, under such a description, a special heir *male*, or *female*, might not take, notwithstanding there was an heir *general* in *esse* of a different description.

Those who held the former opinion, grounded themselves on the authority of Lord Coke in his Comment

Co. Litt. 24 b.

Comment upon *Littleton*, wherein it is stated; that if A. have issue a son and a daughter, and a lease for life be made, the remainder to the *heirs females* of the *body* of A. and A. dieth, the *beir female* can take nothing, because she is not *beir*; for, she must be heir and heir female, which she is not, because her brother is heir; and, therefore, the will of the donor cannot be observed, because here is no gift, and therefore the statute cannot work thereupon. Lord *Coke* refers to several authorities in support of this part of the commentary; but as, upon investigating these authorities, none of them apply, except those that refer to *Skelley's* case as reported by himself and by *Dyer*, fol. 374, upon those authorities alone we must rely for the soundness of this doctrine: for, the reference to the 9th Hen. VI. 24 a. seems to apply only to an observation there made by *Elderker*, that if land be given to a man for term of his life, the remainder to the *right heirs female* of a stranger, which stranger dies having issue a son and a daughter; and then tenant for life dies, the daughter of the stranger shall not have the land because she is not heir to the stranger; which is undeniably law, when applied to a limitation to heirs male or female, without reference to the *body* out of which they are to spring. And the reference to 11th Hen. VI. 13 and 14, which is a further argument

ment upon the same case, as is reported 9 Hen. VI. 24, has nothing contained therein applicable to this question; for, the principal case reported both in 9th Hen. VI. and 11th Hen. VI. turned entirely upon another point. And as to *Brotit.* Done 42, and tit. *Nofme i* and 40, they are only instances where one, not strictly heir male or heir female, may take by descent *per formam doni.* And to this purpose is the case put by *Newton,* then a Judge, 28th Hen. VI. 44; for, he says, suppose one gives a man land for term of his life, the remainder to the right heirs males of his body engendered, to have to them and to their heirs for ever, and, the donee has issue a son and then dies, and the son has issue a daughter who has issue a son and dies, and then the first son dies without issue, the son of the daughter shall have the land for ever; for he is heir to him immediately, and the donor shall have no interest by the interruption after the gift. To which *Fortescue* assents; because, in that case, says he, the son of the daughter claims by force of the gift, (*i. e.*) as heir *per formam doni.*

Then comes *Shelley's* case, in which Lord Coke lays down the principle before mentioned. This was a limitation to A. for life, remainder to the heirs males of the body of A. and to the heirs

Shelley's case,
1 Rep. 934.

heirs males of the body of such heirs males, and for default of such issue, to the heirs males of the body of B. A. had issue two sons, H. and E. H. had issue a daughter and died his wife *enfèint* with a son; then A. limited his estate to himself for life, remainder to the heirs males of his body, and *of the heirs males* of the body of such heir, and for default of such issue, to the heirs males of the body, &c.; and one question was, Whether E. might take as a purchaser as heir male of A. there being a daughter of H. living, who was heir general and right heir of A.? But from the report of this case in *Coke and More*, it appears not to have been requisite to decide, whether E. the second son could take by purchase; the Judges having held that on account of the preceding use for life to A. the remainder operated as words of limitation, and gave A. a vested estate tail male; and so the second son took in course and nature of a descent, as heir male of the body of A. till the birth of his brother's posthumous son, who then became intitled. It being a rule of law, that when hereditaments descend to an heir in a remote degree and afterwards an heir in a more near degree is born, he shall enter and divest the estate out of the more remote heir. But, if the more remote heir claims by purchase, the nearer heir born afterwards cannot eject him.

him. So much of Lord *Coke's Report*, therefore, as applies to the point in question, must be considered as a *dictum* of Lord *Coke's*, and not as the judgment of the Court: but, even if it were agreed to by the Court, it would be an opinion given *obiter*, and irrelevant to the case in judicature. And the difference taken by *Hare*, Master of the Rolls, in *Brook's Reports*, cited in *Shelley's case*, was between a gift in possession to a man and to the heirs females of *bis body*, and a lease to a stranger for his life, the remainder to *the right heirs females of another*; and not, as put by Lord *Coke*, a lease for his life, the remainder to *the right heirs females of bis body*. His Lordship's opinion, therefore, upon this question, must rest on the general argument, and not on the authorities vouched by him. Now, the general argument is, that if, previous to the statute *de donis conditionalibus*, a lease had been made for life, the remainder to the heirs males of the body of J. S.; in that case, if J. S. had two sons, and the eldest son had died in the life of J. S. leaving a daughter, and then J. S. had died, the younger son of J. S. could not, after his death, have taken this fee-simple conditional by the common law; for he was not heir of the body to take by purchase, because, first, he ought to be heir; and, secondly, heir male. And, then, such a limitation subse-

quent to the statute, will be in the same predicament.

Co. Litt. 27 a.

But, the case here put is clearly mistaken ; for, if the estate for life was limited to J. S. then the second son would clearly have been able to take as heir special by descent ; and if the estate for life was intended to be limited to a stranger, then the case put by Lord *Coke* is the very case itself, and so is only arguing in a circle, and rather begs the question than furnishes any convincing argument of the truth of Lord *Coke's* proposition. Consequently, Lord *Coke's* conclusions all resolve themselves into the single question, Whether the analogy between this case and cases where the limitation is merely to heirs male or female, *without reference to the body* strictly holds, and, consistently therewith, the conclusion that, first, the donee should, in the principal case, as in that case, be heir, and, secondly, he should be male.

Mr. Serjeant *Rolle* seems to have considered *Sbelley's* case as confined to a limitation to heirs male or female generally ; for, in his Abridgment, Vol. ii. 416. F. Pl. 5, in citing *Sbelley's* case, he says, " If a gift be made to A. for life, the remainder to the heirs *males* or heirs *females* of J. S. and J. S. die, he that has this remainder

mainder ought to be heir at common law to J. S. and also heir *male or female*, according to the gift ; or, otherwise, he shall not have this remainder.

But, the interposition of the body out of which the heir is to come, seems to make a material alteration in the case ; for, it is necessary to recollect that, in strict conveyances, the words. heirs male or female do not create a conditional fee in the first taker under such a limitation, but give him an absolute fee ; consequently as the common law knows no heir Co. Litt. 27 a. to an absolute fee except the heir general, the additional description does not seem to point out a particular heir, but, rather, to adjoin a quality without which the general heir is not to take, viz. his or her, being male or female ; but the case of a limitation to an heir, male or female of the *body*, seems to be different ; for, at common law, and before the statute *de donis*, this gave a conditional fee, so called by reason of the condition expressed or implied in the donation of it, that, if the donee died without such particular heirs, the land should revert to the donor. But, the nature of a condition being, that when it is performed, it is thenceforth entirely gone, and the thing to which it is annexed become absolute and wholly unconditional, it

followed that, as soon as the grantee had issue born of the description required, his estate became absolute by the performance of the condition; therefore if land had been given at the common law to a man and *his heirs females* of his body, and he had issue a son and a daughter, his having a daughter had been a performance of the condition, and, thereby, he would have had an estate which he might have aliened in fee-simple absolute. Now, from this instance it appears that, independant of any view to the descent, the common law took notice of a special heir under the description of heir female of the body, who was not general heir; for, to the purpose of the performance of the condition, the donee of a conditional fee is, in the preceding case, considered as having had an heir to answer the description of the condition, not only notwithstanding an heir general be living, but, also, in the life of the ancestor. And if such an heir special by description was known at the common law, it is clear that the statute *de donis* made no alteration in that respect, the operation of it being to confine the descent in the line prescribed only. It left the common law relating to these special inheritances in all other respects just as it found it.

Co. Litt. 19 a.
 7 Rep. 35 b.

If

If then (and the instance put appears to me to warrant such a conclusion) the common law, in such cases, acknowledged an heir special, distinguished from an heir general, for the purpose of performing the condition, it appears to be necessary to carry the idea but little further to contend, that such an heir as would, at common law, have been an heir with reference to the performance of the condition should, now, be considered as an heir to take by description under a devise. The intent of the donor applies as strongly in the one case as the other, and the reason of the thing is in favour of this conclusion. Lord *Hobart*, in the case of *Counden* ^{Hob. 32.} and *Clerke*, seems to have been of opinion, that if the devise in that case had been to the heirs male *of the body*, it might have taken effect; for, his Lordship says, if it had been to the heirs males of the body of the devisor (as there it was to the right heirs males of the name of the devisor) it could not have served the brother being collateral, as it might have served an issue male of himself (the testator.)

And Lord *Hale*, and also *Wylde Justice*, were of the same opinion, in the case of *Pybus* and *Mitford*; where M. having issue R. by one *Venter*, and S. by another, covenanted to stand seised to the use of his heirs males begotten, or

Pybus v. Mitford, 1 Vent.
372. 2 Lev. 75.
Raym. 228.
3 Keb. 239,
316, 338.
1 Freem. 351,
369.

to be begotten on the body of his second wife; and *Hale* conceived, that this would be a contingent use in S. by purchase. The great objection against this, he said, was, that the limitation was to an heir, and an heir which ought to take by purchase, ought not to be *only* heir of the body &c. but heir general; but he thought that, the remainder being limited to *the heirs of the body* of the second wife begotten by the husband, such a limitation would make a special heir to serve the turn; because, at the common law before the statute *de donis*, notice was taken, that this was a special heir, and, therefore, it was no wrong done to make him here a qualified heir. And in that statute it was said, "when lands were given to a man and his wife, and *the heirs of their two bodies begotten*," so that the statute, itself, took notice of such special heir.

Vide Robinson
v. Wharrey,
2 Blackst. 728.
cited Harg.
Note, Co. Litt.
219 a. N. 3.

So, the case put by *Littleton*, sec. 352, plainly proves that the law takes notice of a special heir; for this case is put; if a feoffment be made upon condition that the feoffee shall give the land to the feoffor and his wife, and the heirs of their two bodies begotten, in this case, if the husband die living his wife, before the estate tail is granted to them, the feoffee ought to make the estate as near the condition and as near the intent of the condition as may be; viz.

to

to let the land to the wife for her life, without impeachment of waste, the remainder to the heirs of the bodies of her husband and her begotten. Now, as, under this limitation, both husband and wife have an estate tail, because, being limited to the heirs of their two bodies, it is not limited to the one more than to the other of them, the wife could have no general heir during her life; consequently, if the child of their bodies is capable of taking under such limitation, it must be as a special heir of their two bodies, as contradistinguished from an heir general, which the wife could not have while she was living.

Consonant to this mode of reasoning was Lord Cowper's decision in the famous case of *Brown and Barkham*, wherein his Lordship determined, that a younger brother was capable of taking as heir male under a devise to the heirs male of *the body* of the testator's grandfather, though the daughter of an elder brother was *beir general*; and denied Lord Coke's distinction between descent and purchase, so far as it applied to a limitation, *in which the body out of which the beir was to come was particularly mentioned or described.*

Brown et Bark-
ham, Pre. Ch.
442, 461.]

However, it is necessary here to mention, that, upon a bill of review before Lord Chancellor *Hardwicke*, his Lordship, although he decreed in favour of the same person as Lord *Cowper*, took a much narrower ground, resting his decision on particular circumstances furnished by the case, exclusive of the limitation to the heirs of the body. His Lordship, as is stated in Mr. *Hargrave's* Note upon this subject, *Co. Litt.* 33 b. admitted Lord *Coke's* distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule, *that he who claims as heir male by purchase must be general heir as well as nearest male descendant*. His words, as far as necessary here to state them, were these; "As to the first
 " of these questions, it cannot be denied, but
 " that the distinction between an heir male of
 " the body to take by descent, who is the nearest
 " male descendant of the party claiming through
 " males; and to take by purchase, who must be
 " heir as well as male descendant of the body,
 " has been long ago established. The statute
 " *de donis* established the first, and the second
 " has been laid down by Lord *Coke*, in his
 " Comment upon *Littleton*, and is *taken* from
 " his argument in *Sbelley's* case, and *Dyer's Re-*
 " port

" port of that case ; and he has been followed by
 " some later authorities. Lord Cowper argued
 " strongly against the rule. If this doctrine had
 " been RES INTEGRA at the time of his decree,
 " or was so now, I am so fully convinced of
 " the unreasonableness of it, that I would never
 " establish it. But when a rule of law has
 " long prevailed; it ought to be supported,
 " though it be not strictly agreeable to natural
 " reason ; for, in many instances, it is more
 " material that the law is settled than how it is
 " settled." And his Lordship then decided the
 case upon the particular circumstances it fur-
 nished, from whence it might be concluded that
 a special heir was meant.

But Lord Cowper's opinion upon the general question has since been confirmed by the Court of King's Bench, in a case sent to them from the Court of Chancery, on which that Court, in express terms, certified, that, as well on a deed as a will, where a third person, not an ancestor of the grantee, gave an estate to a person by the description of heir male of the body of H.P. one answering that description might take as special heir, although there was an heir general in being, *a complete heir of the person from whose body the entail was to issue.*

Wills. et alias v.
Palmer, et al.
5 Burr. 2617.

The facts in this case were, that an estate was limited (in contemplation of a marriage of A. son of A. P.) to A. P. father of A. until the solemnization of the marriage, remainder to A. for life, remainder to B. wife of A. for life, remainder to the first and other sons of A. and B. in tail, remainder in like manner to the first and other sons of A. by any other marriage, remainder to the heirs male of the body of the said A. P. A. P. had married two wives; by the first he had issue I. P. (who died in his life-time, leaving a daughter, A. W.) and a second son W. P.; and by his second wife he had a son H. P. &c. A. P. by will, reciting the death of I. P. without issue male, and that, in consequence thereof, he was seised in fee-simple of divers hereditaments; devised the same to W. P. for life remainder to his first and other sons in tail male, and for want of such issue to the heirs male of his body begotten. A. P. then died, leaving A. W. his grand-daughter and heir at law, and W. P. his second son heir male of his body, whose issue male failing, H. P. became heir male to A. P.; and one question was, Whether any and what estate passed to H. P. as heir male of the body of the said A. P. by his will? And the Court certified, that an estate in tail male passed to H. P. as heir male of the body of A. P. by the will.

And

And the same point was resolved in the Court of Exchequer, in the case of *Evans*, on the demise of *Burtenshaw*, against *Weslon*.

Vid. Co. Litt.
13 edit. 164 a.
note 2. Mich.
1774, Hil.
1775.

And it was said by *Hale*, Chief Baron, and *Wyndham*, Baron, in the case of *Snow and Cutler*, that a devise to *an heir* may be intended as well to *an heir apparent*, *there being no other*, as to a real heir. *Sed quare*; for, it is there said to have been determined otherwise in the case of *Foster and Ramsay*.

Snow v. Cutler,
vid. 1 Keb.
802.

Thirdly, An heir with relation to property, or the thing to be inherited.

And such heir may be either, by appellation, by inference, by custom, or by accident.

First. By Appellation.

Thus it is said by *Hobart*, that, although none can be *truly* heir but him that the law makes so, yet there is also *an heir* by appellation and vulgar acceptance which imitates the state of a true heir. As if one, by will, devise that his wife shall be sole heir of his real estate; or, that J. S. shall be heir of his land.

Hob. 75.

North v Crompton, 1 Ch. Rep.
196. Nov 48.
Hob. 34.
Stiles 308.

So

Finch arguendo,
2 Sid. 27.

So if A. devise that B. shall be his heir, and C. devises lands to A. and his heirs; then B. shall have those lands as heir to A. Quære.

And in the above cases, J. S. in the former, and B. in the latter, shall have the land in fee; for, such estate as the ancestor who constituted them respectively heir had, such are they to inherit; for, the word Heir shall relate to the same estate that the party, who made the others heir, had in the land.

Spark v. Pur-
nell. Moore
264. Hob. 75.

Thus where F. having the lands in question and twenty acres more in fee, had issue three sons, J.—W. and A. and by his will gave to W. his second son ten acres, part of the twenty, and to A. his third son ten acres, other part of the twenty acres, and then gave to J. his eldest son the lands in dispute, and willed that, when J. should die without heirs of his body, W. should be his heir, and A. should have his part, and that if either the said W. or A. should die, then one of them should be the other's heir, and died. Then J. died without issue, afterwards W. died, leaving issue R. Two points were decided, first, that the last clause, that W. and A. should be one another's heirs, was to be applied to the first clause of the division of twenty acres between

tween them (though the gift to J. and so to W. for the lands in question came between) and could not be applied to the part given to J. and W.; because the last clause was *reciprocal* for lands either of them might take from the other, which suited well the twenty acres; for W. might take from A. by survivor, as well as A. from W. which could not be as to the lands given to J. and so to W. because W. could take no part of them from A. Then, touching those, since there was an estate in tail given to J. and that, for default of issue, W. was to be his heir, that gave W. an estate of inheritance either in fee-simple, or in fce-tail as J. had. Secondly, that the word Heir, in the latter clause, between W. and A. should give an estate for life to the survivor; because the brother, to whom he was made heir, had but an estate for term of life before.

So where A. devised lands to B. and C. brothers, and that if either of them died, the other should be his heir; the question was, Whether or no when B. died C. should have the fee or only an estate for life? and this diversity was taken, viz. that when *a fee* was devised to A. and that if A. died B. should be his heir, *there* B. should have a fee; but where A. had but an estate for life by the devise, *there* B. should take

Gynes v. Kempsley, 1 Freem.
293.

but

but for life. But Serjeant *Maynard* said that when the case was between brothers, these words might pass an inheritance; because they, by intendment, might be heirs to one another: But if the case were betwixt strangers, there, to say that the other should be his heir was no more than to say that the latter should have the estate which the other had. But the Court inclined that C. should take but an estate for life.

Clements ver.
Caffye, Noy
48.

And *Popham*, Justice, said, in the case of *Clements* and *Caffye*, that, if one make his wife heir of all his lands, this gives her a fee therein; but otherwise it is if he make his wife executrix of all his goods and lands; for, there, land shall intend such land as she may have as executrix. And of this opinion was the Court in the principal case.

Pigott ver.
Penrice,
Pr. Ch. 471.

And in such case it will make no difference, although the testator have no lands that his legatee can have as executor. Thus, where one made his neice G. executrix of all his goods, lands, and chattels; it was held that, although the testator had no term or interest for years in any lands whatsoever, yet his lands of inheritance passed not by these words.

Secondly. By Inference.

If one be, by will, constituted heir without mentioning the land, and there be other matter therein from whence it must necessarily be inferred that the land was intended to pass, or that the devisee was intended to be made heir, he shall take as such. As if a man has issue three sons, and devise his lands one part to two of his sons in tail, and another part to the third son in tail, and that neither of them shall sell either part, but that each shall be heir to the other, and die, and then one of the younger sons die without issue; his part shall not go to the elder son, but shall remain to the other sons; because the words, that the one shall be heir to the other imply a remainder, viz. that each shall be in remainder after the other.

So, in the case of *Taylor* and *Webb*, which arose upon a will whereby one devised in these words, "I make my cousin *Giles Bridges* my sole heir and executor," it was held, after several arguments, that the devisee should have the deviser's lands in fee; for, per *Roll Chief Justice*, although the words of the will be not proper, yet, we may collect the testator's meaning to be, by making the party his heir, that he should have his lands; and it is all one as if he had said "my heir

Inkersal's case,
Bro. Dev. 38.
ibid Done 44.
Bendl. et Dalis
2d p. 77 Pl. 7.
King verf.
Remtall,
1 Roll. Abr.
833. N. 2.

Taylor v. Webb,
Styles 301,
307, 319. Et
S. L. 3 Keh.
49. Pl. 23.

heir of my lands." And here he not only makes him his heir but his executor also, and, therefore, if he shall not have his lands, the word Heir is merely nugatory and to no purpose, for, by being executor only he shall have the goods. In such case, therefore, he is *bæres factus*, not *natus*. *Et per Jerman*, Justice, the word "Heir" implies two things; First, That he shall have the lands. Secondly, That he shall have them in fee-simple, and the other Justices concurred.

But it is observable that, in the preceding case, there were several annuities for the devisee to pay, and that the will directed him when the conveyances and assurances of the testator's lands were laid up, which circumstances plainly evinced the testator's intention that the devisee should have the land. But the Court, in giving judgment, do not appear to have resorted to these circumstances, but to have rested upon the devising clause merely.

Tilly v. Collyer,
3 Keb. 589.

Again, where one, having issue by C. three daughters S.—A. and E. devised to C. for life all his freehold, wherever, until S. his heir came to twenty-one, paying to the heir 10*s.* during the term, and to the rest, after fifteen years old, 20*s.* a piece, and the heir to pay to A. and E. 100*l.* a piece, 40*l.* at the decease of the wife, &c. and,

and, if S. his heir died without heir before twenty-one, so that the lands descended and fell to A. then A. to pay to E. &c. It was argued, on a question between the heir of E. and S. that S. took nothing by this devise by implication, there being no express devise to her. But on the other side it was contended, that S. was sole heir; for, it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir, unless made so by the intent of the will, which six times called the eldest daughter his heir, and A. the younger daughter, would have equal share in the land and also the legacies. *Et per Hale, Chief Justice.* The testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake; also she, that is called heir, is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit, here is no express devise to S. yet she being named his heir, this is sufficient to exclude the rest and to make her sole heir.

By Custom, or reference to Custom.

Thus custom makes one, *not heir at law*, a man's heir in Borough English.

So one may make a man, *not his heir*, heir to him by reference to a customary heir.

Supra 374.

As if a man, by his will, give new purchased lands to his heir of his house and land in Borough English, for the more commodious use of it; there, we have seen, that the youngest son, *i.e.* the heir in Borough English shall take.

By accident.

3 Rep. 41 b.
43 a.

As in the case of a *possessio fratrīs*, which *facit sororem esse bæredem*; for, from this expression of Littleton, it is to be implied that, in this case, the sister is *bæres factus*; and that the law, without other act, does not make the sister heir, but the younger brother is, though of the half-blood, after the death of the elder brother, *bæres natus* to the father; for, if the elder brother, neither by his own act nor by the possession of another, gain more than descends to him, the brother of the half-blood shall inherit. So that the sister is made heir by some act either of the brother, or some one for him, which gives him actual possession of the fee or freehold; and if the elder brother has not actual possession, or if it be such an inheritance of which an actual possession cannot be gained, it shall by law descend to the younger brother of the half-blood.

In

In all these cases of description of the person, if it be made with sufficient certainty, so that the person intended may be distinguished from every other person, trifling omissions or misprisions will not make the devise invalid; for the use of names or descriptions are but to make a distinction between person and person; and therefore it is sufficient if the person be so called or described that he may be distinguished from every other. And this holds both in cases of civil and natural persons.

In cases of civil persons.

As, where one devised tenements in London to another for life, the remainder over *ecclesiæ sancti Andreæ de Holborn*, it was pleaded, on an *ex gravi querela* sued out by the parson; that the devise was void, because the church was not *persona capax*; to which it was demurred: And adjudged, that this devise was good to the corporation of the parson of the church of Saint Andrew in Holborn and his successors; for, such description was sufficient in a will to express the parson of the church and his successors, because, though he was not named in the devise, yet he was comprehended in it.

Fitz. Dev. 27.
10 Rep. 57 b.
S. C. Plowd.
Com. 345 a
523.

Dalison 78, c. 8
Owen 35.

So, where a devise was made to the Mayor, Chamberlain, and Governors of the Hospital of Saint Bartholomew, in *London*; whereas they were incorporated by the name of Mayor, Citizens, and Commonalty, it was held good by *Dyer, Weston, and Manwood*; for it agrees with the teste of the corporation of the city, the mayor, and commonalty, and, therefore, though it does not accord with the corporation in the proper name, yet, being by way of devise, it shall be good.

Foster vers.
Walter, Cro.
Eliz. 106.
S. C. 2. Leon.
265.

Again, where W. devised a messuage to his wife for life, remainder to his son in tail; remainder to the Master and Wardens of the mystery of Cordwainers, *London*, who were incorporated by the name of Master, Warden, and Commonalty, the question was, If by reason of this misnomer of the coporation, the devise to them was void? *Et per Curiam*, the devise is good; for, by the intendment, the devisor had not counsel, nor had cognizance of their name, and, the corporation being known usually by that name, there was a sufficient intendment what corporation he did intend should have it.

10 Rep. 57.
Hob. 32.

So a devise unto a college by a name known, although it be not by the very name of the corporation, is good; as to *Trinity College* in *Cambridge*, or to the *University of Oxford*.

In

In cases of natural persons.

As if one be known by the name of *Edward Williamson*, whereas his real name is *Edward Anderson*, and lands are given him by the name of *Edward Williamson*; the same is a good name of purchase. Godbolt 17.

So where one, having a reversion in fee expectant on an estate tail, devised it to *William Pitcairne eldest son of Charles Pitcairne* in tail male, remainder over, and died; it was insisted, on a bill exhibited by the eldest son to have the writings and to receive the profits, &c. that the devisee had no title, because his name was not *William* but *Andrew*; but the Court was of opinion that the plaintiff should have relief; the reason of which was, that there were other words, viz. *eldest son of*, &c. sufficient to point him out with certainty.

Pitcairne vers.
Brase, et al.
Finch Chan.
Rep. 403, et
vid. Dalison,
78, 8.
Owen 35.
Rivers's case,
1 Atk. 410.

So where a devise was to *Margaret*, the daughter of W. K. and her name was *Margery*, it was held that she should take thereby, *quia constat de persona*, by the description.

Gynes vers.
Kemsley,
1 Freem. 293.

So if one devise land to the wife of J. S. and J. S. die, and she take to husband J. D. and then

re Mod. 371.
1 Vin. Abr.
tit. Dev. T. b.
Pl. 2. Plowd.
344.

the devisor die, she shall take the land ; and yet she is not the wife of J. S. when the devisor dies, nor shall she take it as his wife : but the intent is that she who *was* the wife of J. S. at the time of the making the will should have it, and the person is clear by the description.

Vin. Abr. tit.
Corp. G. 6.
Pl. 11. tit.
Dev. W. c.
Pl. 4. Plowd.
344

Again, if a man had devised land to *Alexander Nowel*, Dean of St. Paul's, and to the Chapter there and their successors, and *Alexander* had died, and a new Dean had been made, and afterwards the devisor had died, the land had vested in the new Dean and Chapter ; and yet it would not have vested according to the words, but according to the intent; for the chief intent was to convey it to the Dean and Chapter and their successors for ever, and the single person of *Alexander Nowel* was not the principal cause, though it might have been one of the causes of the devise.

Jaggard verf.
Jaggard,
Pre. Ch. 175.

Upon the same principle it was decreed by Lord Somers, where one, his wife being *enfeint* with a child, (was taken sick and made his will, and, thereby, devised that if his wife should have a posthumous daughter she should have 500*l.* &c.) had a daughter born, and afterwards died ; that this daughter, though born in the life of her father,

father, was a posthumous child within the meaning of the will.

So if a devise be to *William Earl of Pembroke*,
or *William Bishop of Salisbury*, and his name be
John, the devise is good; there being a sufficient
certainty without the christian name; for there
can be but one person Earl of *Pembroke* or
Bishop of *Salisbury*, wherefore the mistaken
christian name shall be rejected as surplusage,
and the devisee take as described by his name of
dignity or description of his office.

1 Inst. 3. 2.

But if the description be false, and not merely
imperfect, the devise will be void.

First. In cases of civil persons.

As if one had devised lands to the Abbot of
St. Peter, where the foundation was of *St. Paul*,
there the devise had been void.

Hob. 33. Br.
Dev. 2.

Secondly. In cases of natural persons.

As if one devise his lands unto the heir of his
brother and to his heirs for ever, and his brother,
at the time of the devise, be an alien not naturalized,
the devise will be void. The reason of

Vid. Colling-
wood vers.
Pays,
1 Sid. 193.

which is, that the devisee was falsely, not imperfectly, described; for, no alien can have an heir.

Per Glyn, Chief
Justice. 2 Sid.
151 Et vid.
supra.

But if, in such case, he who claims under the devise be proved to be the reputed heir of the brother, then, although the father were an alien, the son might take by the devise.

OF A

DEVIS~~E~~ failing of EFFECT.

A Devise, constituted in the manner that has been described in the preceding part of this Essay, may be prevented from taking effect from various circumstances; some of which originate from defects apparent on the face of the instrument, others from collateral matters, or, to speak in technical language, matters *debors* the will.

Of the first kind is any uncertainty or repugnancy in the words of the will itself, which may arise either from an obscurity in the description of the thing devised, or of the interest therein, or as to the general intent of the devisor; these, in legal language, are termed patent ambiguities. Under this branch also we may include limitations that fail, from being formed to attain objects which the policy of the law forbids the effectuating.

Cases of the second kind are, where wills fail of effect by reason of uncertainty or repugnancy arising

arising out of facts existing independent of the will; as when doubts arise as to which of several persons or things, in themselves similar and respectively answering the description used in a will, the will was intended to apply; these are, in technical language, termed latent ambiguities.

Under this head of Failure of Effect, likewise, may be ranked cases in which a will becomes inoperative by reason of the testator's performing or satisfying it in his life-time. Also those, where a devisee waves the benefit of a devise. And cases of fraud by breach of trust. Likewise fraudulent devises, under the Statute 3 & 4 W, and M. c. 13.

So cases where wills fail of effect by reason of revocation, whether positive or implicative, fall properly under this branch of our subject,

Of each of these modes, by which a devise may become inoperative, I shall respectively treat in the three next chapters.

O F

UNCERTAINTY OR REPUGNANCY

APPARENT ON THE

FACE OF A DÉUSSÉ.

IT is a rule universally adopted in the construction of wills, that, whenever there is an irreconcileable uncertainty or repugnancy in the disposition made by a testator of his real property, the title of the heir at law shall be preferred to all others; because, where a court cannot find words in a will, which, either expressly or by necessary implication, denote the testator's intention beyond the possibility of a doubt, the rules of law directing descents, which are certain, must prevail and cannot be superseded by an uncertain devise. Thus one ground upon which Lord Hobart decided in *Counden and Clerke's case* was, that the clause, "that the land should be to the right heirs of the testator's name and posterity part and part alike," made the will, then in discussion,

Hob. 34.
Moore 86a.

discussion, repugnant, uncertain, and insensible; for, if the heir were preferred, that would be an entail, and then none could share with him: and, if the testator meant that all that were males of the name and posterity should take together, then the effect of the word Heirs must be rejected, and the sons should take equally with their father.

Uncertainty, and repugnancy, apparent upon the face of a will, may be either in respect of the application of the words of the will to the thing devised, or to the quantity of interest therein meant to be devised, or to the person described by the devise.

First, in respect of the application of the words of the will to the thing devised, or to the quantity of interest therein meant to be devised.

The first case I have met with in which this was the principal point before the Court, is that of *Ride* and *Atwicke*. There I. seised in fee, devised all his freehold land to his wife for five years, &c. and, by codicil, added, "that if any of his three sons, W. D. or I. died before the five years were out of the freehold, then to be

"equally

"equally divided between those of his sons that should be then living," and no mention of lands was made in the codicil. W. and D. died within five years, D. leaving his wife *enfoint* with a child. And the question between this child, who was heir at law to the testator, and I. the surviving brother, was, as to the application of the words in the codicil; whether they referred to the freehold, and gave it to the surviving brother, so as that he was to have the whole for life, or whether they referred to the five years term, requiring the freehold to be divided upon the death of either of the sons within the five years. And it was argued that for want of the word "it" the latter clause could not relate to the lands given to his three sons, but must relate to the remainder of the five years in the freehold, viz. that so much thereof as should be unexpired should be divided between the sons. But on the other side it was contended, first, that the word "it" must necessarily be intended, and must relate to the lands given to the three sons, and not to the five years; because the lands were the last antecedent, and the five years, by a direct and positive clause, were given to the wife, and she was to pay some legacies out of it, and therefore it could not be the devisor's intent to destroy her interest. Secondly, That

"to be divided among the sons" made them tenants in common, and not joint-tenants. And on the first argument, three Judges were of this opinion; but *Keeling*, Chief Justice, conceived the remainder to refer to the five years, and not to the lands given to the three sons to be divided. *Et adjournatur.* The case was then brought on again, and the Court inclined, *that the lands demised for five years to the wife were to be divided between D. and I. as survivors*; for, on the devise "to be divided on the death of any of his sons within five years," without saying, *what should be divided*, it must be intended the lands were to be divided. But the case was again adjourned, and then came on again for final discussion, when the Court, on different grounds, decided unanimously in favour of the child of D. who was heir at law. But *Keeling* Chief Justice, and *Hyde* Justice, were of opinion that the codicil *was uncertain and derogatory, and so void.*

Price vers.
Warren,
Skinner 266,
S. C. 2 Eq. Ca.
Abr. 357.

Again where P. seised of two messuages in fee, having issue two sons, R. his elder son, and N. his younger son, and four daughters, E. M. O. and A. made his will, and thereby devised his two messuages to N. his younger son, and he to have 30*l.* per annum for his maintenance for ten years after the death of his grandfather, the residue

idue of the profits during that time to be applied for raising portions for his daughters ; and, if N. died, then the estate that N. had to go to his four daughters, *share and share alike*, and then the testator devised in these words, " and if it shall " please God ALL my sons and daughters die " without issue, then to my sister and her " heirs," &c. The deviser died, then the grandfather died, and then N. entered upon the lands, and died without issue. Afterwards the four daughters entered and were seised, and one took husband, had issue, and died, and the husband claimed to be tenant by the curtesy. The question was, Whether the daughter took such an estate as intitled her husband so to be? It was agreed that N. had but an estate for life, and that the words *share and share alike*, made the daughters tenants in common for life, and that the word *estate* as used here, carried no interest, but was only a description of the land, &c. The doubt therefore was, whether the daughters took an estate tail by implication upon the *last* clause in the will ? and the Court were unanimous that they did not. And *Herbert*, Chief Justice, in delivering the opinion of the Court, said that they would favour wills in their exposition as far as they could, but where they were so uncertain, that the intention could not be collected, they ought to fail for their *uncertainty*. That here the testator

testator might have several intents; for, he might intend that the daughters should have the estate but for life, and then that the sons should have it, and, upon their death without issue, that the daughters should have it; or he might intend that the sons should have an estate tail after an estate tail in the daughters; or that, after the death of the daughters, it should descend to the sons in fee, and if they died without issue to the issue of the daughters; and if his sons and daughters died without issue, that he might limit a fee after to his sister. *Though there was a fee before, he might so intend.* It was quite uncertain what the deviser intended; and therefore this clause was void for the uncertainty, and there was no estate tail in the daughters and, by consequence, no tenancy by the curtesy.

But, if the thing devised be clearly described, an error in words of demonstration added will not vitiate the devise.

Blague vers.
Gold, Cro.
Car. 447, 473.
S. C. W. Jones
379.

Thus, where B. seised in fee of two houses in A. the one called the Corner House, in the tenure of B. and of N. and of another house thereto near adjoining in the tenure of H. (which was the house in question) devised his house *called the Corner House in A.* in the tenure of B. and H. to J. S. in fee, upon condition that the same be

new built, according to the covenants between me and B. C. The question was, Whether the house in the tenure of H. adjoining to the corner-house should pass or not? *Et per Curiam*, the corner-house only passed by the will, and not the house adjoining in the tenure of H.—because, although the corner-house was not in the tenure of H. but a misprision, yet the devise was good, for, it was sufficiently ascertained before, viz. the corner house in A. And the addition *in tenura* H. although it were not in his tenure but was a mistake, was but surplusage, and, although false, should not vitiate the devise; because the devise was of a thing certain at the first, and should be expounded according to the intent of the parties as apparent; and the case was, they said, the stronger here by reason of the covenant to re-edify the corner-house, and not the other.

So a devise may be void for *repugnancy*. As ^{Vide 2 Anders}
^{12.} if one give lands to two women and their heirs of their bodies *sub hac forma*, that she that survives *tenebit totam dictam terram integrum* to her in tail; or give to a man and his wife 10*l.* annually to them during their lives, and if the husband die first, then the wife to have but 5*l.* of the 10*l.* In both these cases, the latter provisoies are void; because they are repugnant in themselves to the estates in jointure.

Secondly. Of uncertainty, as to the person described by the devisee.

If the person of the devisee be absolutely uncertain, the devise will be void.

Fitzherb. Dev.
7. 49 E. 3.
2 Anders. 12.

Thus, if one devise land to the two best men of the White Towers; this devise is void, for these are not persons known, and there is no certain intendment to be collected from the words of such a devise.

Per Tracy,
2 Vern. 624,
625. et Sir T.
Raym. 82. S.L.
per Bridgm.
C. Just.

So, if a devise be to one of the sons of J. S. he having several sons; the devise is *void* for uncertainty, and cannot be made good.

Wibb's case,
1 Roll. Abr.
609. D. 1.
Et vid. Scrope's
case infra.

And if a man devise to twenty of the poorest of his kindred; this is void for the uncertainty who may be adjudged the poorest.

Wood v. Ingersole, 8th
Jac. 1 Bulst. 61.
S. C. Croke
Ja. 260. ill
reported, vid.
Pollexfen. 482.
S. L. Hill et
Baker's case,
cited 1 Bulst.
63. et vid.
Saville 92, 93.

Again, where a man, having three sons, and being seised of lands in three counties in fee-simple, made his will, and, thereby, devised one parcel of his land in one county to his eldest son, another parcel in another county to his second son, and another parcel in the third county to his third and youngest son; and devised further, that if any of his sons did die, *then the one of them should be heir unto the other.* The father died,

died, and then the eldest son died, having issue a son ; and the question was, Who should now have the land which the eldest son had, whether his son, being his heir, or his two brothers, being the uncles ? And, by *Fenner, Williams, Croke, and Yelverton, Judges*, the will is good to the eldest son, and his issue shall have the land : and the subsequent clause in the will, after the particular devises ; viz. “ that the one shall be heir “ to the other ” is *repugnant* in itself to the other part of the will, and therefore void in law ; for, by the first clause, the eldest son has the inheritance and an estate for life in his part in possession, and a fee-simple *in reversion* in the other parts, and, by the last clause, it is not certain what issue shall have it ; and judgment was given for the issue of the eldest son against the two surviving sons.

But, if a man have three sons, and devise one part of his lands to the second son in tail, and the other part to the third son in tail, and that neither of them should sell any part, but that each should be heir to the other and die ; in that case, if one son die without issue, his part shall not revert to the eldest son, but shall remain to the other son ; for these words, “ that “ each shall be heir to the other,” imply a remainder, being in a will which shall be intended

Brook, tit. Dev.
38. 7 E. 6.

and adjudged according to the intent of the devisor.

Hambledon v.
Hambledon,
30, 31, 32 Eliz.
i Leon. 166.
S.C. 3 Leon. 262.
Saville 92, 93.
Cro. Eliz. 163.
Owen 25.

And so, in *Hambledon* and *Hambledon's case*, where H. the father devised to his eldest son Blackacre, to his second son Whiteacre, and to his third son Greenacre in tail ; and further willed that, in case any of his said sons died without issue, *then the survivor to be each other's heir*. The eldest son died without issue ; and the question was, Whether one or both the surviving brothers should have Blackacre ? And the Court, on the first hearing the case, was in great doubt ; but it was afterwards holden, that the surviving brothers were joint-tenants, and, although the word Survivor was in the singular number, yet, in sense, upon the whole matter, it should be taken and construed as for the plural number : Survivor should be each other's heir, *i. e.* each survivor, *i. e.* all the survivors. So note the distinction.

Bral v. Wyman,
Styles 240.
2 Danvers
514. Pl. 4.

And where one devised in these words ; viz. " I give and bequeath one half of my lands to my wife, and, after her death, I give all my lands to the heirs males of *any* of my sons or next of kin ;" one question was, Who was described by the latter words of this clause ? And it was contended, by *Latch*, that the words

Heirs

Heirs Males of any of his sons were words certain enough to create an estate, for it was all one as if he had said, to the heirs males of all his sons if they have heirs males, or to those who have heirs males ; and the words "or to the next of kin" were also certain enough, being joined with the preceding words, and should be meant to the next of kin and their heirs males, if his sons had no heirs males ; for, in a will, if there be words to express the meaning of a testator it is sufficient, though the words be not apt. But *Hales* argued on the other side, that this devise was void, because it was uncertain ; for the intent of the deviser did not appear. It appeared not what heir male should have the land, whether the heir male of his son, or the heir male of his next of kin, for the words were disjunctive. *Et per Roll Chief Justice*, the intention of the testator here is *cæca et sicca*, and senseless, and cannot be known ; and we ought not to frame a sense upon the words of a will where we cannot find out the testator's meaning. And *Jerman*, *Nicholas*, and *Ash*, Justices, were inclined to that opinion ; but the case was directed to be argued again. What came of it does not appear.

But a devise is never construed absolutely void for uncertainty, but from necessity; for, if there be a possibility to reduce it to a certainty, the devise is good.

Ungly v. Peale,
2 L. Raym.
1312. 1^o Mod.
103. 2 Eq. Ca.
Abr. 358. 8.
Vin. Abr. tit.
Dev. D. Ca.

^{19.}
Nota. This case
was first ad-
judged in C. P.
and that judg-
ment after-
wards affirmed
on writ of er-
ror in K. B.

Thus where one seised in fee of a house at *Ludgate*, devised the same "to S. and his bro-
" thers successively for their lives," and then
the testator, after mentioning another matter,
went on and said, "And as for my house at
" *Ludgate*, I do not leave it to S. nor his bro-
" thers afore to be entered on and enjoyed
" till one month after their marriages." S.
at the time of making the will had two bro-
thers, R. and O. S. was the eldest; R. the
second, and O. the third son; R. died in the
life-time of S. and O.; and the question was,
Whether this was a good devise, or void for
uncertainty? And it was argued against
the devise, first, that it was void for uncer-
tainty, by reason of the word *successively* not
shewing which should take first and which second
in succession: Secondly, that the condition in
relation to marriage made it more uncertain;
for, till marriage none could take; and suppose
the second brother had married, and neither of
the other two, who must have took? Certainly
none of them; for, if he that was married
should take first, then that would overthrow the
other

other construction of *successive*, that the eldest ought to take first, and then the second, and then the third. *Sed per totam Curiam*, the will was good and certain enough; for, being in the case of brothers, the common law was a guide to the exposition of the word *successive*; viz. that the eldest should, after his marriage, enjoy it first for his life, then the second, and then the third; and the Court agreed, that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general. And therefore that, if the second son had married before the eldest, yet he could not have taken by this devise.

o r

U N C E R T A I N T Y
 A R I S I N G O N
 M A T T E R
 D E H O R S T H E W I L L.

IF, from circumstances existing independant of a will, the person of the devisee be rendered absolutely uncertain, the devise will be void. As if one devise an estate to his son, and, on enquiry, it turn out that he has several sons ; this devise is uncertain for want of the testator's pointing out which son, and consequently the estate goes to the heir at law, which is the eldest.

Cheney's case,
 5 Rep. 58 b.
 et vid. infra,
 Cap. on parol
 declarations
 and averments.

So, if one devise land to his son *John* generally, and, upon inquiry, it turn out that he has two sons of that name, if no proof can be made of the devisor's intent as to which son he meant, the devise is void for uncertainty ; because the law will not make the one or the other by construction inheritable ; for neither the

the elder son shall have it by course of law, because the elder need not have an addition; nor shall the younger have it by construction, by reason the father need not have limited the land to the elder, as the land after the death of the father would have descended to the elder. And therefore, for want of proof of such intent, the will is void.

So, also, if, from circumstances existing independent of the will, it become *absolutely* uncertain what land the testator meant to devise, it seems the devise will be void. As if one devise his manor of R. to A. and his heirs, and it turned out that he was seised of the manors of Great R. and Little R. or North R. and South R. and no proof can be adduced to shew which manor he meant.

Ibid.

But, if the devise were of one of the testator's manors of R. then the devisee should elect which manor he would have.

Vide Bacon's
Maxims 100.

O F

OTHER MATTERS

WHEREBY

A DECREE

MAY FAIL OF TAKING EFFECT.

Cred & Bulst.
63. 19 H.VIII.
Old. Rep.
6. 8. 6.

A DEVISE may fail of taking effect by reason that the intent of the testator in his will doth not agree with the rules of law ; for, such intent shall be void. As if a man devise lands to A. in fee, and if he die without heir, that B. shall have the land. This devise to B. is void ; for, as has been shewn, one fee-simple cannot depend upon another.

And if, in the writing a will, the testator's instructions be not followed, the devise will be void.

Downhall v.
Catesby.
Moore 356.

Thus, where D. gave instructions to have his will in writing made, and ordered his land to be given thereby to one of his sons for life, and the clerk

clerk who writ it, gave an estate in fee; the Court, except *Fenner*, agreed that the will was altogether void, because it was not the will of the testator. But *Fenner* thought, "that, *for as much as the testator intended*, (that was) *for the estate for life*," it should be considered as his will: but all the other Judges were against him in opinion.

But, if that which is contrary to the intent of the testator can be separated from that which is agreeable to his intent, it seems, in such case, the former only will be void. As if one be directed to devise lands to the testator's wife, and, in preparing the will, he insert of his own head a condition, *scilicet*, that the wife shall be chaste; this condition, though standing upon the face of the will, if unknown to the testator, will be void, and the devise absolute.

Vide Sir Richard Pexhall's case, cited i Leon.

113.

A devise may also fail of operation, by doing that which the law would effect without any devise, it being a principle of law that a man cannot give another what he has already, for when he does so *nihil operatur*. Thus, if the tenant in tail enfeoff the donor, it is no discontinuance. Upon the same principle, if a testator devise "that his land shall descend to

*Dyer 12. Pl. 54
Counden v.
Clerke,
Hob. 29.
Godolphin v.
Abingdon,
2 Atk. 57.
Jenk. Cent.
248.*

"his son," the devise is utterly void and idle, and the devisee shall be in by descent.

Dyer 124. Pl. 38.
et Dyer 354.
33 Plowd. 545.
1 Roll. Abr.
626. J. I.
Cro. Eliz. 833.
Vaugh. 271.
S. L. of a
copyhold, vid.
Smith v.
Triggs,
1 Strange 487.
et Hurst v.
Earl Winchel-
sea, 2 Burr. 880.
S. C. 1 Blackst.
Rep. 187.
as to appoint-
ment by will.

So if a man devise lands to a person that is his next heir and his heirs, the devise is void, and the heirs shall take by descent. Thus, in debt, against the heir, the defendant pleaded that he had but the third part of twenty acres by descent. The issue was, Whether he had not the whole? and it was found, that the obligor, his father, devised the whole to his wife, until the defendant, his son and heir, should come unto the full age of twenty-four years, and from thenceforth to him and his heirs. And judgment was given for the plaintiff; for the fee-simple descended to the son.

Vide: Rep. 51 a.
Cholmley's
case, et
1 L. Raym.
523, 527.
Salk. 233.
Comyus 62.

Again, if there be A. tenant for life, remainder to B. his son in tail male, *remainder to A. and the heirs male of his body*, remainder to A. in fee; and A. having another son C. devise his remainder, after the death of B. without issue, to C. his second son *in tail* male. This devise can never take effect, and therefore is void; because the estate tail in the father will descend at the same time, and take place of the estate tail devised, and then the devisee will take the old entail by descent, which will exclude the new estate.

estate limited by the will; because the will gives no more nor otherwise than the devisee would have taken by the entail, as is apparent by the comparison of the descents; for the estate tail devised expires *equis passibus* with the estate tail in A. the father.

But, if, in the preceding case, the *reversion* expectant upon the determination of the estates tail had been in A. the devisor instead of a *remainder*, the devise to C. his second son in tail had been good, though it could never by any possibility have taken effect in possession; because, in that case, tenant in tail would have held of him in reversion, and he of the chief lord; and, consequently, the devisee of the reversioner would have been intitled by the devise to the services which tenant in tail is to perform during the continuance of the estate tail, and which would otherwise descend to the heir general of the testator. So that the effect of the will would *then* be, that B. would from thenceforth hold of C. instead of holding of A. and C. would hold of the chief lord, and the lord should avow upon C. *modo et forma predictis*. So that the will, in such case, would take effect by creating a seignory and tenancy, though it could never take effect in possession.

Vid. Yelv. 149.
Moore 344.

This rule, that the devisee shall be in of the elder title, viz. by descent, has been said by some to have been adopted in favour of the heir, that he might be in of his better title, and, thereby, toll an entry, or have a warranty. But if that were the case, he would be intitled to an election to take either under the will or under the devise, as might be most for his advantage ; but that he cannot do. The rule seems rather to have been adopted in favour of third persons, viz. of the lord, for the preservation of the tenure, (which was a valuable thing before the statute of *Malbridge*) and of creditors for the preservation of their debts.

And the alteration of an estate in reversion that the law casts on the heir into an estate in remainder which is given by a devise, is not a difference concerning the estate *in point of estate*, between what the law directs and what the devise directs ; in such case, all the difference is in the manner how and time when the heir shall come to the estate. And therefore, if a man devise land to his wife for life, the remainder to J. S. (he being the devisor's next heir) in fee, this devise is void, and he shall be in, after the death of the wife, by descent, which is the more worthy and elder title,

Preston v.
Holmes,
Styles 148.
1 Roll. Abr.
626. J. 2. et
Bashpool's
case, 2 Leon.
101. 3 Leon.
118. S.C.
4 Leon. 35.
Strange 491.

title, and not by purchase by way of re-
mainder.

So if the limitation in fee to the heir by de-
vise be after an estate tail ; the devise will be
void in point of limitation, and the heir will
take by descent and not by the will.

Thus, where H. had three sons, A. B. and C.
and devised lands to B. his second son, after the
death of his wife, to hold to him and his heirs
for ever ; and for want of such heirs then to his
own right heirs. H. died, and B. entered,
and died without issue living the eldest son ; and
it was held, first, that the second son had only
an estate tail, because the words *Heirs here*
could import nothing more than issue, for B.
could not die without heirs living heirs of the
father. Secondly, That the eldest son took by
descent and not by the will, and the devise over
was void *in point of limitation* ; for the devisor's
intent was, that the lands should descend *from*
himself and not from his son B.

Nottingham v.
Jennings,
1 Salk. 234.
S. C. Comyns
82.
1 P. Will. 29.
L. Raym. 568.

Nota. Here a
clause merely
void controls
an express de-
vise. Et vide
S. L. 3 Will.
368, Note A.

And a devise of an estate for life to the heir
at law will, if no further disposition be made
thereof, be void ; because the fee-simple, which
descends upon him, drowns the particular estate
for life.

3 Leon. 26.

Thus,

3 Leon. 25.

Thus, where a man had issue two daughters by several women, and, being seised of lands in fee, devised that his wife should have the moiety of his lands for years, and his eldest daughter, at the day of her marriage, should enter into the other moiety. His eldest daughter married and died without issue : And the question was, Whether her uncle, as heir at law, should have that moiety or the fourth part of the whole land ? And this depended upon what interest the elder daughter took by the devise. And it was held, that when the devise was made to the eldest daughter, that she might enter after certain years, the inheritance notwithstanding passed into the daughters presently, they were intitled to enter in common as one heir to their father until the marriage ; and then, there being no words of limitation of any estate that the eldest daughter should have after the marriage, she could have but an estate for life, which, as to a moiety of the moiety was void, being merged in the fee that descended ; and, as to the other moiety of the moiety, did not remove the inheritance which was once settled in them as coparceners. Consequently the uncle should have but the moiety of the moiety, viz. that part which descended to the eldest daughter, and merged the estate for life devised, and the other sister should have the other moiety of the moiety

of the land which passed into her presently, subject to her sister's estate for life; and so of the moiety devised to the mother for years when it fell in.

Charging an estate, devised to the heir at law, with money to be paid to younger children, is not such an alteration of the *estate* as will make the heir take by purchase.

Thus, where P. seised of lands in fee, and having issue R. S. I. and M. sons, and N. a daughter, devised to S. I. M. and N. 20*l.* to be paid unto them, when they attained to the age of twenty-one years; and devised all his lands to R. his eldest son, to hold to him and his heirs, *upon condition he should pay to his other children the said sums appointed unto them, according to the intent of his will; and if he refused payment of any of the said sum or sums of money, that then neither he, nor his heirs, should have or enjoy the said lands, any devise, title, descent, or interest to the contrary notwithstanding; but that the said sons and daughter should have it to them and their heirs.* It was held, that the first devise to the son and his heirs in fee, being no more than what the law gave, was void.

Haynsworth
v. Pretty,
Cro. Eliz 833,
919. S. C.
Moore 644.

F f

So,

Clarke v. Smith,
Comyns 72.
S.C. i Salk.
241.

So, where one, feised in fee, devised lands to his wife for life, and after her decease to his next heir at law, and to his or her heirs; provided such heir should pay 100*l.* to such person or persons as his wife, by will or other legal writing, should appoint, and that his land should stand charged with the said 100*l.* The devisor died, leaving a daughter, who had one son and died. The wife died without making any appointment to whom the 100*l.* should be paid. The son of the daughter entered and died without issue; and on a dispute between the heir maternal of the son, and the heir paternal, the question was, Whether the son took by purchase under the will, or by descent? And it was resolved by the whole Court, that the heir took by descent and not by the will; for it would be mischievous, if every little legacy should alter the course of descent, and thereupon the heir might plead to the obligation of his ancestor, *riens per descent.*

Allam v. Heber,
Strange 1270.
S.C. i Blackst.
Rep. 22.

So, where a father devised his lands to his heir for payment of debts, the Court held that, notwithstanding they were a charge on the land, yet the heir was in by descent, for the tenure was not altered.

Again,

Again, where the father devised hereditaments to his son and heir in fee, but chargeable with debts, and an annuity or rent-charge payable to his widow ; it was held by *Holt* Chief Justice, that these hereditaments descended to the son, and were assets ; because, whenever the devise conveys the same estate as the law would make by descent, but charges it with incumbrances, the heir takes by descent, and not by purchase.

Emerson v.
Inchbird,
1 L. Raym.
728.

And the law will be the same, although, from the circumstances of the case, it will be most beneficial for the heir at law to take by the devise, and not by descent.

Thus, where a man, seised of lands *a parte materna*, devised them to his executors for payment of his debts for sixteen years, and afterwards to one that was his heir *a parte materna* ; the question was, Whether he took by descent or by purchase under the will ? and *Charleton*, before whom the case was made, inclined that he took by purchase, that being the best for him ; because then the heir *a parte paterna* might inherit before the heir *a parte materna*, and so both heirs be inheritable. But *Pemberton*, *Wyndham*, and *Levinz* held, that the devise was void, and he should take by descent ; it being no more than if the devisor had made a lease for sixteen

Hedger v. Row,
3 Lev. 127.

years, and then devised the reversion to his heir; and they said the descent from him to the heir *a parte paterna* or *materna* was only a consequence arising out of the nature of the estate.

But there are two cases which seem, in some degree, to warrant a distinction, where the charge is put by way of condition, and where by way of charge.

Gilpin's case,
C. C. 161.

The first is *Gilpin's case*. There the ancestor, seised in fee of lands, devised them to his son and heir, and to his heirs, *upon condition* that he should pay his debts within a year, and if he failed, that his executors should sell and pay his debts. The heir entered and did not pay the debts, and the executors afterwards entered and paid the debts, and sold the lands; and it was adjudged at *Kingston*, that it was assets in the heir's hands, because he devised to his son and heir in fee. And error was assigned in the King's Bench for that cause, and it was held that the judgment was erroneous; for, although the heir had a fee, yet he had it as a purchaser, being tied with such condition; and a rule was granted to reverse the judgment.

Brittan v.
Charnock,

The other instance is in the case of *Brittan* and *Charnock*. There the father, seised of a messuage

messuage and three acres of land in fee, devised the same to his eldest son and his heirs within four years after his decease, *provided* the son paid 20*l.* to the executrix towards the payment of the testator's debts; and then he devised his other lands to be sold for payment of debts. The father died, the son paid the 20*l.* and the question was, If this messuage, &c. was assets in the son's hands? It was contended against the claim of the heir as a purchaser, that if a devise were of land to one and his heirs within four years, it was a present devise; and if such devise were made to the heir, the lands would descend in the mean time, and the words, "with-
" in four years," be void. And then the question was, Whether the word Paying would make the heir a purchaser? and it was said it would not; for it made neither a condition nor a limitation, but a charge upon the land, and such a charge as the heir could not avoid in equity. But by *North* Chief Justice, and *Atkins* Justice, where the heir takes by a will with a charge, as in this case, he doth not take by descent but by purchase; and therefore this estate is no assets.

But as this case is reported in *Freeman*, it is said, that the Court was inclined that the land should go to the executors for the four years,

² Mod. Rep.
286. S. C.
¹ Freem. 248.

and that the heir was not in by descent but as a purchaser; because the estate was clogged with the payment of 20*l.*: and though they admitted the rule, that wherever the heir had his election to take one way or the other, and that he came to the estate both ways alike, there the law, for the benefit of creditors, adjudged him in by descent rather than by purchase and devise; yet they said that, here, unless the devise were void, he could not take but upon the payment of 20*l.*

Clarke v.
Smith, *supra*,
434. *Vid.*
Comyns 73.
Salk. 242.
Pl. 2.

Supra 434.

But, in the case of *Clarke and Smith, Treby*. Chief Justice, and *Powell* Justice, denied both *Gilpin's* case and the case of *Brittam and Charnock*, as unintelligible and ill reported. So that when the case of *Brittam and Charnock* is coupled with the case of *Clarke and Smith*, it stands upon the opinion of two Judges against two, and *Gilpin's* case is expressly contrary to the decision of the Court unanimously, viz. *Popham, Gaudy, Fanner, and Yelverton*, in the case of *Haynesworth and Pretty* (which is directly in point) as well as to the opinions of *Treby* and *Powell*, as delivered in the case of *Clarke and Smith*.

Vid. 5 E. 4, 6.
per *Billing*.

A curious consequence follows from this rule of law as to the descent to the heir, in case the heir,

heir, to whom the devise is made *qua* heir, be a daughter, and there is a posthumous son born; for, in such case, the son shall have the land and not the daughter; because it being the intent of the father to give his lands in like manner as they would have gone at common law, as at common law, the birth of the son, had the lands descended, would have divested the lands out of the daughter, so shall it also notwithstanding the devise.

An alteration as to the time of the heir's coming to the estate, we have seen, does not interfere with this principle; but wherever the devise makes an alteration of the limitation of the estate from that which takes place in the course of descent, *there*, the principle ceases to operate, and *consequently* the heir takes by purchase.

And, therefore, if a man, having two daughters being his heirs, devise his land to them and their heirs and die, they shall have it as joint-tenants *by devise*, and not as coparceners *by descent*; because the devise gives it them in another degree than the common law would have given it them; for, by the common law, each of them would have had a distinct moiety, but, by the devise, they are joint-tenants, and the survivor shall have all.

Preston v.
Holmes;
Nottingham
v. Jennings;
Clarke v.
Smith;
Hedger v.
Rowe: *Supra*

Vid. Cro. Eliz.
431. Pl. 36.
Gouldsb. 141.
Pl. 53. 3 Lev.
127, 128.

Per Fenner,
Owen 65.

So if a man have land in Borough *English*, and also guildable lands, and devise all his lands to his two sons and die, they shall take jointly, and the younger shall not have a distinct moiety in Borough *English*, nor the elder in the guildable land, but they are both joint-tenants.

Wid. Bear's case,
1 Leon. 112,
113.

And the law would be the same if one, having several sons and being seised of gavelkind lands, devised them to his sons, who were heirs by the custom; for, in such case, they would be joint-tenants by the devise, and the survivor should have the whole; whereas, if the lands had descended, they would have been in the nature of parceners.

Nor would it have altered the case, if the devise in the three preceding cases had been to the daughters, or heirs as tenants in common.

Bear's case,
1 Leon. 112,
S. C. 315.

Thus, where T. seised in fee of the lands in question, being of the nature of gavelkind, devised them to his heirs by the custom, and to their heirs *equally to be divided amongst them*. The question was, Whether they should be in by descent or devise? *Et per Anderson, C. Justice*, let us consider the devise by itself, without the words, "*equally to be divided amongst them*."

And

And I conceive they shall be in by the devise; for they are now joint-tenants, and the survivor shall have the whole; whereas, if the lands shall be holden in law to have descended, they should be parceners, and so as it were tenants in common; and although the words subsequent, "equally amongst them to be divided," makes them tenants in common, yet that doth not alter the case. And *Wyndham* and *Rbodes*, Justices, were of the same opinion.

So, if one, having two daughters, devise all to one, she shall take all by the devise, and shall not take a moiety by descent as heir, and a moiety by the devise; for, this is not a devise to *an heir*, because *both* coparceners make the heir, and the *one* is not an heir without the other. And there can be no such descent as the descent of a moiety to one coparcener as heir. If one plead a descent *uni filiae et cobæredi*, it will be ill. Besides, if it were held that one took a moiety by descent, it must be held, *consequently*, that the devise, as to a moiety, was void, and then the said moiety ought to descend to both as heirs to the testator, and consequently the devisee would have but three-fourths of the lands where they were devised to her *in toto*. This was determined in the case of *Reading* and *Royston*. There H. having two daughters, one of which had issue a son, and died,

Co. Litt. 163 b.

Reading v.
Royston,
S. Lk. 242.
S.C. Comyns
123. 2 L. Ray.
829. et vid.
2 Roll. Rep.
352, et Palmer
373. S. L. per
Doderl. Ig., ar-
guendo.

died, devised his land to the son and his heirs for ever. And the question was, Whether the son should take all by the devise, or the one moiety by descent, and the other moiety by devise? for, then, as to that moiety he took by descent, his aunt, the other daughter, would be coparcener with him. And it was argued, that where two titles concur, the elder shall be preferred, and that as to one moiety, which the grandson had by the devise, he had the same estate in it and no other by the devise than he would have had without it, and, therefore, since the devise worked no alteration in point of estate as to that, the grandson should take it *in potiori jure*, which was by descent. But it was resolved by the Court, that the grandson should take all by the devise, and could not take a moiety by the descent as heir and a moiety by the devise.

Vid. 2 L. Raym.
832.

And a devise so circumstanced may be good in part, and void in part, as to one entire thing. As if a man devise one moiety of *Blackacre* to B. his heir *in fee*, and the other moiety to him *in tail*, the heir shall take the fee by descent, the devise as to that being void; and the other moiety he shall take in tail by the devise as a purchaser.

A devise also may fail of taking effect, by reason of a waiver of the benefit thereof by the devisee;

devisee; and such waiver may be either express or implied.

An express waiver is where the devisee actually refuses to accept the thing devised.

An implied waiver is where the devisee does an act, from whence it is inferred that he does not accept the benefit intended him under the will.

It is a conclusion in equity, that, wherever any person, having a claim upon a man's estate independent of him, and also a claim thereupon under his will, which claims are repugnant to each other, pursues the former, the latter is thereby waived or abandoned; for, it being against the intention of the will that the devisee should have both, equity, therefore, considers such devise to be upon an implied condition that the devisee shall abandon his original title; or shall waive his title by devise.

The leading case upon this point is that of *Noys* and *Mordaunt*. There E. having two daughters, made his will, and devised to M. his eldest daughter his lands in B. and eight hundred pounds in money, to N. his second daughter his lands in S. and thirteen hundred pounds in money,

Noys verf.
Mordaunt,
2 Vern 581.
Vid. 2 Vern.
232, 233. Gilb.
Eq. Rep. 15.

money, provided and on condition she released, conveyed, and assured B. lands to her sister M. and devised further that, if he should have a son, the devise to his daughters should be void, and in that case he gave 1200*l.* to M. and 1000*l.* to N. provided also that if he should have another daughter, then he gave the 800*l.* devised to M. to such after-born daughter, and the 1300*l.* devised to N. to her and such after-born daughter equally between them. The testator soon afterwards died, leaving his wife *enseint* of a daughter E. M. married H. and died without issue, not having given any release to N. her sister, according to the will. E. claimed, not only the lands devised to her by the will and a moiety of what was devised to her sister N. but also a moiety of the B. lands devised to M. they having been on the testator's marriage settled on himself for life, and his wife for her jointure, remainder to the first and other sons, remainder in default of issue male to the heirs of his body. And the question was, Whether she should be at liberty to substantiate that claim, or whether she ought not to acquiesce in the will or renounce any benefit thereby. *Et per* Lord Keeper, in all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands intailed or under settlement; it is upon an implied condition that each

each party acquit and release the other ; especially, as in this case, where the testator plainly had the distribution of his whole estate under his consideration, and had given much more to E. than what belonged to her by the settlement, and had it in his power to have cut off the entail.

In the preceding case, it is observable that the Lord Keeper dwells strongly upon the circumstance of its being an arrangement among the testator's children, by a total disposition of his property between them, and by which the devisee took a greater interest than she would have been intitled to under the settlement ; and also that the devisor was tenant in tail and consequently might have barred the estate tail by fine or recovery. But these arguments were only used in corroboration of his opinion, the general principle being sufficient of itself to support the rule, had the case been stripped of these circumstances. Accordingly the rule is laid down by Lord Talbot in the case of *Streatfield* and *Streatfield* on broader grounds; for his Lordship there states it thus : " When a man takes upon him to devise what he has no power over, upon a supposition that his will will be acquiesced under, the Court of Chancery will compel the devisee, if he will take advantage of the will, to take intirely, but not partially under it ; there being a tacit condition

annexed

annexed to all devises of this nature, that the devisee do not disturb the disposition that the devisor has made."

*Streatfield v.
Streatfield,
Ca. T. Talbot
376.*

In that case, T. S. the grandfather of J. T. S. by articles previous to his marriage, agreed to settle lands in S. to the use of himself and his intended wife for their lives, and the life of the survivor; and, after the survivor's decease, to the use of the heirs of the body of T. S. on his wife begotten, with other remainders over. The marriage took place, and, by deed, reciting the articles, T. S. settled lands in S. to the use of himself and his wife for their lives and the life of the survivor, and, after their decease, to the heirs of the body of T. S. on M. begotten, *remainder to the right heirs of T. S.* They had issue one son, J. S. and two daughters. Upon the marriage of J. S. other lands of considerable value were settled by T. S. on him. J. S. died, and then T. S. levied a fine of the lands comprised in his own marriage-settlement to the issue of himself in fee, and made a will, and thereby devised part of those lands to his two daughters, "and all other his manors, "messuages, lands, tenements, and hereditaments "whatsoever, either in possession, reversion, or "remainder, not therein before given or disposed "of, situate in the counties of H. S. or elsewhere "he devised to trustees in trust for J. T. S. his "grandson

"grandson for life, remainder to his first and
"other sons in tail male, remainder to his
"daughters in tail, remainder to the testator's
"own daughters, with remainders over, &c."

And it being held that the settlement made in pursuance of the agreement on T. S. the grandfather's marriage, was not a proper execution thereof, the question was, Whether the general devise to the grandson should be taken as a satisfaction for what he was intitled to under the articles; for, then, he must be put to his election, either to accept that settlement, or waive all benefit under the will? And it was argued on behalf of the grandson, that this devise could not be considered as a satisfaction of the articles; for, nothing could be taken as a satisfaction but what was agreeable to the nature of the things in lieu of which it came. But here the grandson was only tenant for life, and that not absolutely but contingent, on his attaining the age of twenty-one. That the general devise of all the testator's manors, lands, &c. *in possession, reversion, or remainder*, would not alter the case; for, where the testator had sufficient to answer the general words, he should never be construed to have intended to pass that which he had no right to dispose of, and the giving of which would work a wrong. That supposing he had been, not under his own, but by another settlement, a trustee for his son,

and

and made his will in the same words that he had done here, that trust estate would never have passed, and there was no difference between a trust expressed or implied. It would be absurd to construe these words to pass away a third person's estate. That such a construction would take away a beneficial interest from the grandson who was heir at law to his grandfather, and give him but a very small one in the room of that taken away. And that if he was decreed to make his election, it must be done presently, for then it was that he was to take, but he could not by law make his election, being but an infant; and then the Court must compel him to that which the law disenabled him from doing. But Lord Talbot was of opinion, that the grandson could not claim both under the will and under the articles; for it was plain that the intent of the grandfather in levying the fine was, to have the absolute ownership of those lands in him, and under the apprehension that he had thereby given himself a power of disposing of them, he gave part thereof to his daughters: and it would be a very strained construction to say that he intended this not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles; then he must have looked upon himself as master of one part of them as well as of the other. And his Lordship distinguished

tinguished this case from cases where the question was, Whether general words should ever pass lands so circumstanced in the hands of a testator as not to be capable of the limitation he makes by his will ; because here the testator had, at law, a power to dispose of the lands, and, though they might be affected with a trust in equity under the articles, yet that could not be supposed to lie in his cognizance, he having done an act to enable himself to dispose of them ; nor could it be compared to the case of an express trust, and the trustee devising *all his lands* ; for, *there* the trustee could not be ignorant that the lands which he held in trust were not his own. Then if the testator's intent was to pass these lands by the will, the question was, Whether the devisee could take any advantage under one part of the will unless he permitted the other part of it to take effect ? And his Lordship was of opinion that, upon the principle that governed in the case of *Noys* and *Mordaunt*, he could not ; for, though what was given to the grandson in this case was precarious, (nothing being given to him if he died before twenty-one, and if after, then but an estate for life,) and he appeared before the Court in the favourable light of heir at law, yet this would not alter the case ; because the estates which the testator had given him were undoubtedly in *the testator's own power*, and he had given them to trustees

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until his grandson attained twenty-one, and then had disposed of them in such a manner as that there could never be any undisposed residue to go to him as heir at law. And, *therefore*, it was as much in the power of the Court to make this bequest thus limited to be a satisfaction, if the party will stand to the will, as in other cases. And his Lordship decreed the grandson to have six months after his attaining his age of twenty-one to make his election.

And the rule equally applies, whether the benefit under the will be immediate or consequential ; for, though the effect in such cases is, that the devise operates as a satisfaction for the previous interest of the devisee, yet the principles by which satisfactions, strictly speaking, are governed, do not apply to cases of this kind ; therefore it is not necessary that the thing given by devise should be of the same nature, or of adequate value with the thing in lieu of which it is to be received.

Roberts *vers.*
Kinglly,
1 Vez. 238.

Thus, where by articles before marriage an estate was agreed to be settled on husband for life *sans waste*, remainder to the heirs male of his body, with power to raise portions for younger children, and a settlement was afterwards made (also before marriage) in pursuance of the articles, and

and observing the very words thereof. The husband levied a fine, declaring the uses to himself in fee, and, afterwards, by his will made a provision to trustees for payment of his son's debts, for which purpose he directed them to make a proposal to his creditors. And the question was, Whether, if the son took the benefit of the devise for payment of debts, he could have the settlement rectified according to the intention of the articles? And it was contended that he might; for, that nothing was here given to the son by the will. It was not in his power to prevent the proposals from being complied with, and though his debts would be thereby discharged, that was not such a benefit as was within the rule, that one who took any thing real or personal under a will should be precluded from litigating any part thereof. But Lord *Hardwicke* was of opinion that, if the son submitted to and took a benefit under his father's will, he must be bound thereby; for, what was applied for payment of his debts was for his benefit, and the same as if paid to himself; therefore, though he was intitled to relief, and to have the settlement rectified according to the true intent of the articles, he must make his election, and could not have the benefit of both the articles and the will.

Heather v.
Rider,
A. 426.

Again, where H. seised in fee of several freehold estates, and likewise possessed of leasehold estates, and also of a considerable personal estate, by his will bequeathed an annuity of 20*l.* to his daughter A. H. and the heirs of her body quarterly, without any abatement, and, in case she died without issue, then to his two sons, E. H. and W. H. whom he made his executors. W. H. died intestate, and left issue E. and three other children. E. H. the other executor, gave an annuity of 20*l.* to his sister A. H. and her daughter after her, to be paid quarterly without any abatement out his freehold houses in H.—but, in case they died without issue, then the said 20*l.* *per annum* to return to his nephew, and gave him besides all his real estate which he had from his father. And by a codicil says, “ I hope the “ 20*l.* to my sister H. will not be taken for another 20*l.* annuity, but to settle and confirm the “ 20*l.* *per ann.* her father left her and her daughter. And if they die without issue, let it come “ to my heir, E.” But this codicil was not executed according to the statute of frauds and perjuries; for, it was only an indorsement upon the back of the will, and with a pencil; and, therefore, though the testator’s intention was most plain that his sister should have only one annuity, but that it should rest on a more secure fund than a fluctuating personal estate, by being charged on

a real

a real estate, which was not done by his father's will; yet, as nothing could be taken either to enlarge or diminish what affected a real estate, unless it were executed according to the statute of frauds and perjuries, this indorsement, not complying with those directions, could not be of any weight. The question therefore was, Whether A. H. and her daughter should have both annuities? And Lord *Hardwicke* thought she was not intitled to both annuities, not so much on account of the codicil as by way of exoneration of the personal estate of the father. The devisor was the only person chargeable by way of personal demand, and might, by codicil or testamentary schedule, which affected a personal estate according to the rule of the civil law, direct that, in case his sister should take the annuity under his will, she should not have it out of his father's personal estate, but that his personal estate should be discharged therefrom; and, taking it in that light, it did not contradict the statute of frauds and perjuries.

And Lord *Talbot*, where the will comprised both real and personal estate, and the land to which one child was intitled in tail was thereby given to another, and a personal legacy to the tenant in tail, went so far as to infer an intent, that whoever took by that will should comply

with the whole, and put the party to an election of the estate tail, or the personal legacy.

If the devisee be a creditor, and not a volunteer, this rule does not apply.

Deg v. Deg,
2 P. Will. 412.

Thus where D. on his marriage with S. settled lands in R. and S. in strict settlement, with remainder to A. D. a relation in fee, with a covenant in the settlement that 3500*l.* being the wife's fortune should be laid out in the purchase of lands in fee-simple in the name of trustees, and settled to the same uses; S. the wife died leaving three sons S. D.—W. D. and J. D. D. the father, laid out 3000*l.* part of his wife's portion of 3500*l.* in the purchase of lands, and bought them in his own name: then D. married a second wife, with whom he had 2000*l.* portion, and covenanted to add 2000*l.* thereto, and to raise a further sum of 4000*l.* and lay the same out in lands to be settled to the use of himself and his wife, remainder to their children. But, during his first marriage, D. by indentures of lease and release reciting the covenant for laying out the 3500*l.* and further reciting that the 3500*l.* had been all received by D. and also that lands in R. together with lands in M. had been purchased with part of this money, and that there was a defect in the said settlement made upon S.'s marriage,

riage, in that there was no provision made for younger sons of that marriage, therefore D. for supplying that defect, and in pursuance of the trust, conveyed the lands in D. and M. to trustees to the use of himself for life, remainder to trustees for one thousand years in trust for raising portions for younger sons not exceeding 4000*l.* remainder to the first and other sons, &c. remainder to the same uses as were limited by the former deed of settlement, with a power of revocation by D. Then D. made his will, and thereby devised his lands in S. and all his lands in R. and elsewhere in the county of R. and the equity of redemption thereof, and all his personal estate to trustees, their heirs, executors, and administrators in trust, that they should sell all these devised lands, and, thereby, together with his personal estate, pay all his debts, and the surplus to be applied as by his will directed, leaving the trustees executors. Soon afterwards the testator died, leaving three sons by his second wife, being indebted 8000*l.* and upwards by marriage articles, 570*l.* by simple contract, and 233*l.* for rents and profits received after his first wife's death from an estate that, upon the death of his first wife, belonged to S. D. his eldest son. It being held, that neither the settlement made on the marriage of the second wife, nor the will could affect the trusts under the first settlement,

question arose between the eldest son S. D. and the creditors, whether S. D. ought to be let in to a share of the assets devised for payment of debts, since the estate at R. was part of the lands devised for that purpose, and the eldest son opposed this estate's being made liable to them, in which he opposed his father's will, and hindered, as much as he could, its taking effect? And it was said that, in case the son would take any advantage of the will, he ought to abide by the whole. But to *this* it was answered and resolved that, as to the R. and M. lands, taking it that the son had a specific lien thereupon, they were his own lands; and a court of equity would not compel any person to admit a testator's devise of lands which were not his own but the creditors lands, because the debtor had by his will provided for payment of debts; for the creditor was intitled to come in upon the fund given by the testator for payment of debts: so that, as to the settled lands in R., the testator's, the father's devise, was as much void as if he had devised any other part of his son's estate. And, therefore, this case was distinguishable from the cases where the son was a volunteer and not a creditor,

Clark vers.
Guide, 2 Vols.
617.

Again, where G. being indebted to C. in wages, money laid out, and money lent, made his will, devising, among other legacies, 50*l. per annum* to C. for

C. for life, to be paid punctually every year out of his real and personal estate, and then went on, "Whereas I am indebted to C. in the sum of 500*l.* she having my obligation for 680*l.* 2*s.* 4*d.* Memorandum, paid her 100*l.* to let B. have, and at divers times having paid her 80*l.* I make the balance, and I am indebted to her in the full sum of 500*l.* I ordain this to be paid out of my real and personal estate." The question was, Whether C. should have her *whole* debt and also the annuity under the will, or whether she should have only the debt as calculated by the testator? And this depended upon, whether this case fell within the rule now treating upon. And it was held that it did not; for the testator's intent was not to make a composition of a debt he owed C., nor to give part in lieu of the whole of it, but to pay her the whole debt beside the 50*l.* annuity, and, therefore, the testator's misrecital would not preclude her from saying more was due to her. This case therefore might be determined in favour of C. without weakening the established rule, it being distinguishable, the testator not intending that any particular sum should come out of his estate, any otherwise than as such sum amounted to the whole of the debt. Nor did this prejudice the residuary legatees; for the residue being given *after payment of debts*, it was consequently uncertain, and they could not say

say they sustained a prejudice if this debt turned out larger than stated. So that the rule was safe, and the intent of the testator was preserved this way and no otherwise.

So where the will, by which the disposition is made that raises the obligation to accept thereof or waive all benefit under it, disposes of land, to which the devisee has a preceding claim, but is not executed so as to pass it, the rule does not apply; for the foundation on which these cases rest, is, that there is an implied condition in such a will that those claiming benefit by it should suffer the whole to take effect, and *then* it must necessarily refer to the *validity* of the will; for, where the Court must make a construction by implication from the force of the instrument itself, viz. the will, it must see the will, and then, when the instrument is of such a nature as that it cannot be read as a will of real estate, not being executed in the manner necessary to reach that, it cannot be known or taken notice of by the Court as at all affecting that kind of property.

Hearie vrs.
Greenbank,
1 Vez. 298.

Thus where W. having an only daughter under age but married to R. devised all his freehold, copyhold, and real estate whatsoever and wheresoever, and all his leasehold estate to trustees, their heirs, &c. to apply the same

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to the sole and proper use of his daughter during her life, and to be at her disposal, not subject, &c. and to permit her by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose thereof as she should think fit. The daughter R. being seised and possessed of freehold, leasehold, and personal property, made her will, disposing of all her estates as well real as personal as therein was mentioned, and, amongst other legacies, gave 8000*l.* to her only daughter, and charged her real estates with her legacies. This will, though made under a power, being void as to the real estate, one question was, Whether, if the daughter would take the 8000*l.* she should be admitted, in equity, to contradict and defeat her mother's will as to the real estate? And, as to the equity of the devisees of the land from the claim of the 8000*l.* legacy, Lord *Hardwicke* was of opinion, that this case differed from *Noys* and *Mordaunt* and the other cases on that head, and that the infant was not obliged to make her election; for, here, the will was void. And, when the obligation arose from the insufficiency of the execution or invalidity of the will, there was no case where the legatee was obliged to make an election, for, then, there was no will of the land.

Vid. supra
168—170.

Per Ld. Hardw.
1 Vez. 307.

So suppose a man devised a legacy charged upon land to his heir at law, and the land to another, and the will was not well executed according to the statute of frauds for the real estate; the Court would not oblige the heir at law, upon accepting the legacy, to give up the land.

But, if there be an express clause annexed to a will, that a legatee, disputing the will, shall thereby forfeit all benefit under it, there a devisee, claiming under it, will not be intitled to any benefit if he oppose a part of it relating to land, although, as to that, it be an imperfect and invalid disposition; because the conditional clause, (to prevent breaking in on the statute of frauds, and at the same time to attain natural justice, which requires such a construction to be made as that the intent of the testator should not be overturned) will be taken as annexed to the personal legacy, and then the Court must consider every part of that, whether it be a matter relating to real estate or not; for, the whole will relating to personality must, in such case, be read, let it refer to what it will.

Boughen v.
Boughton.
2 Vez. 12.

Thus, where a freeman of London devised his real estate to his younger son B. and all his personal estate among his children, particularly 1200*l.* upon some contingencies to G. the daughter

daughter of his eldest son, adding this clause:

" If any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute or controvert the whole or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole or any part thereof, or the codicils thereto belonging, or not comply with the whole and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of; revoking what I gave to them, I give to my residuary legatees." This instrument was attested in the common form, but it was not subscribed by the testator nor by any witness. There was a codicil, without date, but signed by the devisor, taking notice of and reciting that, in further consideration of this his last will, he made a codicil thereto and gave directions therein. G. by the death of her father, happened to become heir at law to her grandfather, and so intitled to whatever he left to descend, or ought to have descended from the invalidity of his disposition. And the question was, Whether, on the general reasoning

Reasoning and foundation of the case of *Noys* and *Mordaunt*, G. must not make her election either to have the £200*l.* or the land which happened to descend to her; or, to be more plain, whether if she chose the real estate she must not waive the legacy? On the part of G. it was argued *that*, to shew G. broke this condition by taking the real estate, it must be shewn that, by the will, the estate was devised to other purposes, and that she did not suffer it to go according to the will; that it must first be established that there was a will made, and next, what was the meaning of it; for, the condition was to abide by the whole will, but there was no will as to the land. And the case was compared to that of *Hearle* and *Greenbank*. But, *per Curiam*, G. ought not to take the benefit of this personal legacy without waiving any right to the lands descended; for, the devise in this will amounts to the same, as if the testator had annexed a condition to permit the younger son to enjoy the land. The reasonable construction is, that none of the devisees should receive any benefit by the will, unless they suffer the whole instrument to take effect, not having regard to the validity or force of it according to the statute of frauds, but to the clauses and expressions used. This then being an express condition annexed to a personal legacy, G. cannot take both the legacy and the real estate.

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And, if a man give a portion or legacy to a child or other person in lieu or satisfaction of a particular thing expressed, that shall not exclude him from another benefit, although the other benefit claimed be contrary to the will of the donor; for, courts will not construe that, as meant in lieu of *every* thing else, which a testator has said is to be in lieu of a *particular* thing.

Thus, where G. by his will gave 1000*l.* for the benefit of his daughter for life, and, afterwards, to be divided among such child or children as his daughter *should leave* at the time of her decease. The daughter married E. who, by his will, recited that "G. had agreed to give his daughter 1000*l.* on marriage, but did not, but by his will gave 1000*l.* to his daughter for life, and, afterwards, to go among our children;" then he proceeded and said, "G. was a worthy and honourable gentleman, and I believe was persuaded his giving the 1000*l.* in *that* manner was performing the agreement, which 1000*l.* with other money, I have laid out in bank stock: now, in honour of his family, and to make good his intent and will, I give to my wife 1000*l.* and, after her death, *equally* to my two sons W. E. and G. E. my daughter P. having, in her marriage settlement, *released* her right under the will of G. if she had any." The

East v. Cook,
2 Vez. 30.
Oct. 30, 1750.

testator gave *other* beneficial legacies to his son, G. E.—G. E. as surviving his brother and mother, brought a bill against the representatives of his father to have a transfer of *this* 1000*l.* bank stock. The defendants the children of W. E. insisted that G. E. was intitled only to half; because the father's will had made *a variation* from the grandfather's, and they insisted that, as this claim was in contradiction to his father's will, if he insisted on it, he must give up the beneficial legacies and portions therein according to the rule settled in *Noys* and *Mordaunt*. But Lord *Hardwicke* was of opinion that E. the father intended that the will of G. the grandfather, should be performed *absolutely*, except in the particular mentioned, and his Lordship put that construction on the will: But he said, admitting, for argument's sake only, that there was a variation between the two wills, still the right to this sum must have rested on G.'s will, and that introduced the question, Whether G. E. could break in upon the construction of his father's will, and at the same time claim the portion therein? And his Lordship thought that it was far from being clear that, even so construing E.'s will, it would have that consequence, when it declared what the provision for the plaintiff should be in satisfaction of, and that was not of this sum.

No

No case upon this rule has as yet gone so far, as to establish the proposition that, if a devisor in his will takes upon himself to dispose of an estate in which he has no interest, but which is absolutely another's, and, in the same will, gives a beneficial thing to the owner of such estate, the owner of the estate shall either waive the benefit of the devise or renounce his estate; the foundation of the rule being a supposed misconception of the testator as to the situation of his own property.

And, where the testator has property of his own to answer the description given in his will of that which he means to dispose of thereby, his devise will be construed as applicable to his own property of that description, and not to the property of another, though equally answering it.

Both these points seem to have occurred in the case of *Timewell* and *Perkins*. There A. T., having two daughters by several husbands, viz. M. T. and S. P. the latter of whom S. P. inherited certain *ground-rents* from her father, made her will, and, thereby, gave to M. T. "all
" her mortgages, *ground-rents*, judgments, &c.
" whatever she had or should have at her death,
" as plate, jewels, linen, household goods, and
" horses for her use, that no husband should
" meddle with them, and at her death to give

H h

" them

*Timewell v.
Perkins,
2 Ark. 103,*

"them to whom she pleased." Also she gave "her houses in B. and T. to M. T. for her own use to give to whom she pleased;" also she gave to S. P. "her freehold estate in E. to dispose of to whomsoever she pleased, and her two houses at C. it being all freehold for her own use, and, if she should have children, for her to give them as she pleased; but if she died leaving none, to M. T. and her children." And, hereupon, it was contended that, as the testatrix had expressly devised the *ground-rents* to M. T. S. P. was bound thereby; because she herself took by another part of the will, and for that reason could not except to particular devises, but must take the will as it stood. But it was held that this argument would not hold here; for, as it was not a particular ground-rent that was devised, and as the testatrix might have other ground-rents of her own to satisfy this part of the will, the Court would so intend it. And, besides, that it was impossible the testatrix should give away to M. T. from S. P. what was S. P.'s inheritance from her father.

But, in order to put a devisee to the alternative of either waiving his interest under a will, or foregoing his claim to some interest disposed of therein to which he is previously intitled independent of the will, it must be clearly evinced that the devisee's

wife's taking both interests will defeat the general intent of the devisor. And, therefore, where one devised his personal estate to trustees in trust "as to so much thereof as should be and remain at his seat at P. at his death, that they should suffer his wife to use and enjoy the same for so many years as she should live, and, as to his real estate, devised it, subject to his debts and raising 5000*l.* for his child or children as therein mentioned, to the use of his first and other sons, and, in default of such issue, then to the use of his daughter and daughters, and, in default of such issue, then to the use of his wife for her life. And, by a codicil, the testator further devised his K. estate to be sold and the money arising therefrom to be applied, discharging the mortgages upon that and also on the S. estate to the intent that the S. estate might be free and clear, to his wife, and that, after the two mortgages paid, his wife should be intitled to receive the rents of the overplus of the K. estate during her life, and, after her death, to go in strict settlement in the manner in which he had settled his lands in the body of his will." The testator had also another estate called the N. estate. He left four sons and two daughters. The wife entered upon the S. and K. estates. And one question was, Whether she, having so entered upon the S. and K. estates,

Ingleton v.
Northcote,
3 Atk. 430.

and claiming the personal estate, was also intitled to dower upon the N. estate ; or whether, by accepting of those beneficial interests under the will, she had not barred herself of her dower in the N. estate ? And it was objected that she had, for she could not have both, because the devises by the will and codicil did, in some measure, clash with her claim of dower, and were intirely inconsistent with it, as the testator gave her that very estate in remainder out of which she demanded her dower ; and, therefore, it was contended she must either take totally under the will, or totally reject it. But Lord *Hardwicke* was of opinion she was intitled to dower and also to the devise and legacies : and this upon the authority of the case of *Lawrence* and *Lawrence*, which his Lordship said was a case in point determined in the House of Lords, upon the circumstances at large, and not upon any one of them in particular. Besides, his Lordship said, this case stood distinguished from that of *Noys* and *Mordawit* upon the reason of the thing likewise ; for, the claim there would have overturned the will *in toto*, but the widow *here* did not claim to overturn the will *in toto*, but claimed merely a temporary interest ; and it was only taking out that excrecent interest for a time, and, afterwards, it would go on as the testator intended it.

Infra 480.
2 Vern. 365.
1 L. Raym.
438.

So,

So, in the case of *Ayres and Willis*, where a man, by his will, taking no notice of his wife's right to dower, made a provision for her out of his personal estate by way of residue, Lord Hardwicke held, that the wife might claim her dower; for, her doing so would not break in on the will; and his Lordship said, the case was the stronger, as it was only a residue, which accidental benefit he might intend she should have as well as dower.

Ayres v. Wilks,
1 Vez. 230.

Again, where J. S. on his marriage with F. entered into articles, whereby he covenanted, in consideration of the marriage and of 12,000*l.* portion, that, in case he should happen to die after the marriage before the said F. he would leave her worth 1,500*l.* immediately upon his death, or, if she should then judge it more convenient to take the third part of all his estate, both real and personal, she should have liberty so to do. The marriage took effect, and J. S. died without issue, having made his will, and thereby given several parts of his real estate to his wife for life, and made her sole executrix and residuary legatee. J. S. had but a small fortune at the time of the marriage, but, afterwards, acquired an estate in the land of 1,000*l. per annum*, and a personal estate of about 1,200*l.* after debts and legacies paid. The widow brought a bill

Waller v. Fuller,
2 Eq. Ca. Abr.
301. 18. 8 Vin.
Abr. 244. Pl.
19.

against the devisee of her husband's real estate, and against the heirs at law, to have the benefit of her election to have a third of the testator's real estate, and also the benefit of the lands devised to her by the will, and the *residuum* of the personal estate. But Lord Chancellor King decreed her a third of the real estate in fee, and the residue of the personal estate; because she could not take the estates for life devised to her by the will, for that would have been inconsistent with the claim she made to the inheritance of the third part by virtue of the articles. But as to the *residuum* of the personal estate, that she might take by the will, for that claim was not inconsistent with the articles, and, where the articles and will were not inconsistent, but both might stand, there she might claim, and have the benefit of both.

A devise also may become void and fail of effect by a man's performing that, which it is the object of it to accomplish, in his lifetime.

Husbands v.
Husbands,
1 Vern. 95.

Thus, where a man intending to build a seat upon his estate, and having laid the foundation of it, made his will, and thereby devised land for raising portions for his younger children, and paying of his debts, and appointed that 400 £. should

should be laid out in perfecting the building of his house. It happened that he lived several years after the making of this will, and, in that time, expended upon his house above 400*l.* He then died, leaving the above will and the house unfinished. The will was defective for passing lands, not being executed pursuant to the statute of frauds. And the question was, Whether the heir at law ought to have the benefit of the 400*l.* by the will appointed to be laid out on this house? And it was insisted on the part of the younger children, that he ought not, because the testator himself, after the making of this will, had expended above that sum on the house. And upon this ground the Lord Chancellor decreed against the heir at law, who was plaintiff in equity for this sum.

A devise of lands may also fail of effect in consequence of the statute 3 and 4 W. & M. cap. 14, which recites that, "Whereas it is not reasonable or just, that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless it hath so often happened, that where several persons, having, by bonds or other specialties, bound themselves and their heirs, and having afterwards died seised in

" fee-simple of and in manors, messuages, lands,
 " &c. or had power or authority to dispose of
 " or charge the same by their wills or testa-
 " ments, have, to the defrauding of such their
 " creditors, by their last wills or testaments, de-
 " vised the same, or disposed thereof in such
 " manner as such creditors have lost their said
 " debts; for remedying of which, be it enacted,
 " &c. that all wills and testaments, limitations,
 " dispositions, or appointments, of or concern-
 " ing any manors, messuages, lands, tenements,
 " or hereditaments, or of any rent, profit, term,
 " or charge out of the same, whereof any per-
 " son or persons at the time of his, her, or their
 " decease, shall be seised in fee-simple, in posse-
 " sion, reversion, or remainder, or have power
 " to dispose of the same, by his, her, or their
 " last wills or testaments, shall be deemed and
 " taken (only as against such creditor or cre-
 " ditors as aforesaid, his, her, and their heirs,
 " successors, executors, administrators, and af-
 " signs, and every of them) to be fraudulent,
 " and clearly, absolutely, and utterly void, fru-
 " strate, and of none effect," &c.

" And, for the means that such creditors may
 " be enabled to recover their said debts," it
 further enacts, " that in the cases before men-
 " tioned,

"tioned, every such creditor shall and may have and maintain his, her, and their action and actions of debt upon his, her, and their said bonds and specialties, against the *beir* and *beirs* at law of such *obligor* or *obligors*, and such *devisee* or *devisees*, jointly, by virtue of this act."

Before this statute, if an obligor devised his land, the devisee, selling or aliening it before action brought, was not liable to the obligee. This statute was therefore made to remedy the defect in the 13th of *Eliz.* cap. 5, of fraudulent conveyances, and to extend the benefit of it to fraudulent devises.

The general view of this statute being to prevent creditors from being defrauded of their debts, and to put all devisees upon equal footing with the heir where lands descend upon him, it has, according to the known rule upon statutes meant to prevent frauds, received the most liberal construction.

Vid. Kinnaston v. Clark, 2 Ark. 205.

In an action brought on this statute, the devisee cannot be sued alone, for, the heir must be joined with him. But there are no instances of precedents of judgments at common law on this statute. The reason seems to be, that a bill

Vid. 3 Ark. 434.

in equity may be brought under this statute as well as an action ; and the proceedings in that court are more expeditious, for a sale may be directed, as they have both heir and executor before the court.

Warren v.
Stanwell, at
the Rolls,
2 Atk. 125.
et vid. Gawler
v. Wade,
1 P. Will. 29.

On a bill brought upon this statute, an objection was made for want of parties, because the heir at law was not before the Court ; in answer to which it was insisted, that where the creditor came against the alienee of the devisee, it was not necessary to make the heir a party. *Sed per Curiam*, the objection must be allowed : it is admitted upon all hands, that, if an action at law is brought, it must be both against the devisee and heir at law, and equity follows the law in this respect.

But, in the preceding case, the bill was not preferred against an alienee of the devisee, but an assignee under a commission of bankruptcy only, who stood in the place of the devisee, and represented him.

Ber L. Hardw.
2 Atk. 435.

This statute being made merely for the sake of creditors, and not at all in favour of heirs at law, it has made no manner of alteration, but barely between the creditor and the devisee, and as to the heir and devisee the law is the

the same as before. Therefore, if a bond creditor come upon real assets, he shall resort to the lands descended in the first place: for, the heir is only intitled after all gifts are satisfied, and therefore is first liable to pay specialty debts. And a devisee is in the nature of a purchaser, who is always to be preferred to an heir at law, although, in *rei veritate*, the purchaser come to the land without any valuable consideration; for, the consideration of the purchase is immaterial in such case. And therefore where a bill was brought to have satisfaction out of assets, both descended and devised, Lord *Talbot* directed, that if the personal estate were not sufficient, then, in the next place, an account was to be taken of assets descended upon the heir at law; and, if that should be deficient, then an account was to be taken of the devised estate.

Vid. Herbert's
case, 3 Rep.
12 b.

Pitt v. Ray-
mond, cited
2 Atk. 435.

It is provided by the 4th section of this statute, " That where there hath been or shall be " any limitation or appointment, devise or dis- " position, for the raising or payment of any " real or just debt or debts, or any portion or " portions, sum or sums of money, for any " child or children of any person, other than " the heir at law, according to or in pursuance " of any marriage-contract or agreement in " writing,

" writing, *bona fide* made before such marriage,
 " the same and every of them shall be in full
 " force; and the same manors, messuages, lands,
 " tenements, and hereditaments, shall and may
 " be holden and enjoyed, by every such per-
 " son or persons, his, her, and their heirs,
 " executors, administrators, and assigns, for
 " whom the same limitation, appointment, de-
 " vice, or disposition was made, and by his,
 " her, and their trustee or trustees, his, her,
 " and their executors, administrators and af-
 " signs, for such estate or interest as shall be
 " so limited or appointed, devised or disposed,
 " until such debt or debts, portion or portions,
 " shall be raised, paid, and satisfied; any thing
 " to the contrary in that act contained notwith-
 " standing."

Vid. Barnardis-
ton's Rep. 304

On this clause it has been decided, that if, in a devise for payment of debts, any debt be excepted so that the same is not for the payment of all the testator's debts generally, such case is not within the benefit of this proviso.

O F

P A R O L D E C L A R A T I O N S
 A N D A V E R M E N T S
 R E S P E C T I N G

D E U J S E S.

EVERY instrument in writing consists of Vid. 8 Rep. 155. two parts ; matter of fact, and matter of construction of law. The one, namely, matter of fact, may be averred by the parties interested in the instrument, and is triable by jurors : the other, namely, matter in law, is to be discussed by the court only before whom the same is brought in question, which is to decide according to the language appearing upon the face of the instrument, without reference to any parol evidence to explain it. From hence proceeds the rule, *that parol declarations of testators offered in evidence, to controul their instructions conveyed to writing in their wills, whether of real or personal estate,* (for the law is the same in both cases if the value exceed what is allowed to pass

Vid. Brett and Rigden's case,
 Plowd. 345.
 3d Resol.
 Cro. Ja. 145.
 Moore 222.
 Cheney's case,
 5 Rep. 68.

Vid 2 P. Will.
136, 137, 141.
2 Vez. 217.
1 Vez. 63.

pass by parol;) or to give an import to their language, which it would not otherwise bear, were, from the time that wills were required to be in writing, considered as not admissible respecting them. And, since the statute of frauds and perjuries, the reason against admitting such evidence is become still more obvious and decisive.

Parol declarations of a testator may apply to the devise, or to the person of the devisee; in either case they are equally inadmissible.

I shall first call the attention of the reader to the instances which occur in our law-books respecting parol declarations as to the devise *itself*; and secondly, to such as are to be met with respecting such declarations as to the person of the devisee.

First. As to parol declarations respecting the import of a devise.

Cheney's case,
5 Rep. 68.
23 Eliz.

It was determined in *Cheney's case*, where one devised hereditaments to H. his son, and to the heirs of his body, the remainder to T. C. of W. and to the heirs male of his body, on condition "that he or they, or any of them, should not "alien, discontinue, &c." that T. P., heir general of the devisor, should not be received to prove

prove by witnesses, that it was the intent and meaning of the devisor to include his son and heir within those words of the condition, " he or they," and not merely to restrain T. C. and his heirs males of his body by those words.

So where a grandfather, mortgagee of lands, purchased to himself the equity of redemption thereof, and, having two sons, the elder of whom had disengaged him, the grandfather and the mortgagor joined in a conveyance to T. his youngest son; but there was no consideration or trust expressed, and the grandfather continued in possession, leased the same, received the rents, and, by his last will, devised the lands to T. but expressed not for what estate, and died. Upon a question, Whether this purchase was intended as an advancement for the son, or as a trust for the grandfather? the evidence of two persons, that the grandfather's direction was to devise to T. and his heirs, was given, not with a view by such parol declaration to enlarge the effect of the will, but, as an evidence of the trust and intent. But the Court held, that this was a trust, and that the parol proof would not alter the case.

Elliot v Elliot,
2 Ch. Ca. 232.
July 1677.

So, in the case of *Towers and Moor*, the plaintiff endeavouring to have the will explained

Towers v. Moor,
2 Vern. 98.

by depositions of witnesses, touching what the testator declared, and the instructions he gave for the drawing of his will: the Court said, that *devises of land* must be in writing, and they could not go against the act of parliament.

Vernon's case,

4 Rep. 4, 5.

Mich. 14,

15 Eliz. S. L.

Lawrence v.

Dodwell,

1 L. Raym. 438.

S.C. 1 Lut. 734.

1 Eq. Ca. Abr.

219. May 1717.

Sed nota. Lord Somers was of opinion, that such an averment might be admitted in equity, and decreed accordingly; but his decree was reversed by Wright, Lord Keeper, and that reversal affirmed in Dom. Procrum. But the reason of that affirmation is said to have been, that it had been determined at law. So quære, How it would have been had the case come on first in equity? 1 L. Raym. 438. Sed vid.

Gosling v. Warburton, Cro. Eliz. 128, cont. where expressed.

† Bertie v. Falkland, 1 Salk. 232. S.C. 2 Vetr. 333. Hil. Will 3. 1698.

* And one reason given in *Vernon's case*, why, if a man devise land to his wife for term of her life *generally*, it could not be averred to be for the jointure of the wife, and in satisfaction of her dower, was, that the whole will concerning lands ought to be in writing, and no *averment* ought to be taken out of the will, *which could not be collected from the words contained in the will*.

† And where C. by will devised lands to trustees and their heirs, upon trust to take the profits for three years, and if, within the three years, there happened a marriage between G. and W. who was then ten years of age and his heir at law, then to W. for life, remainder to her first son, &c. and if the marriage did not happen then the remainder to F. in tail. The marriage with G. did not take effect, but W. married another person of equal family, fortune, and person. And, on a bill brought by W. and her husband to have the estate, suggesting that she ought not to be injured, having done all she could

could to bring about the marriage. Evidence from papers, letters, and sayings of the testator, was offered to prove his intent in this will was not, that it should be in G.'s power to make *her* forfeit. *Et per Curiam*, consisting of Chief Justice *Treby*, Lord Chief Justice *Holt*, and Lord *Somers*; these collateral papers and all parol proof as to what the testator declared or intended, cannot be taken notice of to influence the construction of the will; for that would be to let them in, and make them part of the will itself; and by the statute of frauds and perjuries, every part of a will must be in writing. And before that statute, when a will was in writing, no collateral proofs by papers or words could be admitted, because a will was a complete and consummate act of itself.

Again, where R. B. having a considerable estate, and being much indebted, and having no son but several daughters, married one of his daughters to B. and, upon the marriage, entered into a deed, wherein, after reciting a settlement which he had made of his estate on himself for life, remainder to trustees and their heirs, on trust to sell the same, and to apply the money got for it for payment of his debts, &c. he covenanted, that if B. should be minded to purchase his estate, the trustees should sell it

Bromley v.
Jeffries, Pre.
Chan. 138.
Hil. 1700.

him 1,500*l.* cheaper than any other purchaser would *bona fide* pay for it. Afterwards R. B. made his will, thereby revoking the settlement, and devised his estate to G. and gave 1,500*l.* to B. 500*l.* to his wife, and 100*l.* a piece to his children. On a bill brought by B. for a specific performance of this covenant, it was insisted, that the legacies devised by the will were in satisfaction of the covenant; and the will mentioning nothing of the matter one way or the other, witnesses were examined to prove it, and other witnesses to prove the contrary. And, on the hearing, it was debated, whether these proofs could be read; and it was urged that they might, for the other side would have it presumed, that the legacy was in satisfaction of the covenant; the will said no such thing, and the witnesses offered were to give evidence against this presumption; and the cases of *Foster* and *Munt*, and *Cordell* and *Woden*, were cited. But, *per Lord Keeper*, as matters have been settled since my Lord *Falkland's* case, they cannot be read; for, it would be a way to introduce uncertainty, and make the Court arbitrary. And that case was much stronger than this; for there the proofs intended to be made use of were letters of the testator's own writing, and yet were rejected.

Vid. next case.

And, in the case of *Strode* and Lady *Falkland*, where the doubt arose on what was meant by a testator, who (having a reversion in fee expectant upon an estate in tail male in himself and his heirs in part of his lands, and which would take effect in possession if he had not a son, and having a fee-simple in other parts of his estate) after other devises, devised "all other " his lands, tenements, and hereditaments *out of settlement*," and then died without issue. And *letters of the testator*, and other evidence of his declarations and discourse were offered to prove what was the testator's intention by these words, "All other, &c. *out of settlement*." And at first, Lord *Cowper*, Chancellor, was of opinion, that this evidence might be admitted; and his Lordship brought Lord Chief Justice *Trevor* into that opinion; but afterwards, on deliberation, *Tracy*, *Trevor*, the *Master of the Rolls*, and the *Chancellor* agreed, unanimously, that this kind of evidence could not be admitted; for, where a will was doubtful and uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain it; for, if it might, then marriage settlements or purchases might be defeated twenty years after they were made, by such parol proof started up.

Strode v. Lady Falkland,
3 Chan. Rep. 98.
Trin. & Anne,
1709. et vid.
1 Vez. 231.

3 Chan. Rep. 94.

Bennett v.
Davis,
2 P. Will. 316.
Mich. 1725.

So where A. having married his daughter to a tradesman, made his will, and devised the estates in question (being lands in fee) to his daughter for her separate and peculiar use, exclusive of her husband; and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived his wife, but that they should, on the wife's death, go to her heirs. There being a doubt whether the wife could take this as separate estate for want of the interposition of a trustee, parol evidence was offered to prove, that the testator did not intend these lands should be liable to the husband's debts. But the Court would not permit such evidence to be read, *it being in the case of a devise of land*, which, by the statute, must be all in writing.

Parsons v.
Lanoe, 1 Vez.
189. 1748. et
vid. 2 Atk.
216, 373.
S. I.. as to de-
clarations re-
specting per-
sonal property.

And, in the case of *Parsons* and *Lanoe*, in which there was evidence of the testator's speaking of a will, and shewing that he did not intend to die intestate, of which he expressed some intestation; Lord *Hardwicke* observed, that the will being so penned, that the whole disposition (which was of real estate as well as personal) was provisional only, to take effect in the event of the testator's not returning from *Ireland*, which he did; *collateral* or *parol proof* could not be taken into consideration, for

for it would be dangerous, and what the Court, since the statute of frauds, was not warranted to do.

Secondly. Respecting the person of the devisee.

It was held, in *Brett and Rigden's case*, that a testator's saying to T. B. (to whose father he had devised all the lands and tenements in question; but who died during the life of the testator) that he (T. B.) should be his heir, and should have all the lands and tenements which H. B. his father should have had by the testator's last will, if he had survived the devisor, was of no effect in law, and that no regard ought to be paid to it, inasmuch as it was not written in his will; for the statutes of 32 and 34 Hen. VIII. gave liberty and authority to every one to devise his lands by his last will and testament in writing. In which case, all that could make the devise effectual ought to be in writing: and if that, which was in writing, was not sufficient to make the lands pass without the words spoken to T. B. the son, then, it followed, that the substantial matter which should make the land pass was not written, but rested in words only, and was not within the statute, which no will but a will in writing was: which was as much as to say,

*Brett v. Rigden,
Plowd. 345.
3d Resol.
10 Eliz. et vid.
Fuller v. Ful-
ler, Cro. Eliz.
422. S. L. as to
tenant in tail.*

that all that was effectual and to the purpose must be in writing, without seeking aid of words not written.

Challoner and
Bowyer's
case, 2 Leon. 70.
29 Eliz.

Again, in an assize of novel disseisin, it was given in evidence, that B. was seised, and having issue two sons and two daughters, devised his lands to his younger son in tail, and, for want of such issue, to the heirs of the body of his eldest son; and, if he died without issue, that then the land should remain to his two daughters in fee. B. died, then the younger son died without issue, living the eldest son, having issue him who was tenant in the assize: And it was moved, that, notwithstanding that, by way of grant, the son, living his father, could not take as heir, that was, by limitation as heir to his father, because that none could be said or held heir to his father as long as the father were alive; yet, by way of devise, the law would favour the intention of the party, and the intent of the devisor should prevail. But the Court were unanimously of a contrary opinion, and held, that it was all one in case of a devise, as of a grant. Whereupon the tenant produced witnesses, who affirmed upon their oaths, that the devisor declared his meaning concerning the said will, that, as long as his eldest son had issue of his body, the daughters should not have the land. But the

Court

Court utterly rejected the matter; and judgment was given for the plaintiff,

So in the case of *Starling and Ettrick* before- ^{Supra 372.} mentioned, in order to shew that the testator, by the words "right heirs male" meant heir male apparent, evidence was offered of parol discourses and declarations of the testator as to the manner in which he intended to settle or had settled his estate; and that he had often declared, that he would settle his estate so that if R. S. died, his nephew S. S. should have it. But the Lord Keeper was of opinion, that it would be of fatal consequence to admit examinations of this kind, to carry estates contrary to the words of a will, and to what, by law, they did import; and he refused to admit an examination to these matters,

As, in analogy to the rules of law respecting deeds, with regard to that part of them which consists of construction in law, no *parol declarations* respecting wills are admitted to explain, enlarge, contract, or rescind *the language* used therein, the construction thereof being the proper business of the judge, and restrained to arise out of the instrument alone; so, in analogy to the law respecting deeds as to that part of them that consists of matter of fact, the law respecting

wills as to the same part, admits of averment by the party, *where the matter averred stands with the words of the will.*

Vid. 8 Rep. 155.
47 E. 3. 16. b.

Thus, if A. levy a fine to W. his son, to have, and to hold to him and his heirs; upon this fine the Court cannot make question for any matter of law: but the party may come and aver matter of fact, and say that A. had two sons named W. an elder and a younger, and his intent was to levy the fine to W. the younger. This averment out of the fine is good of this matter of fact, which well stands with the words of the fine, and may be tried by the country.

8 Rep. 155.
Keilw. 49.
Pl. 6.
12 H. VII. 7.
26 H. VI. I. 6 a.
19 E. 2. Grants
93.

So, if a man levy a fine of the manor of S. or of the manor of D. to one *et baredibus*, and, in truth, there is the manor of North S. and South S. or Great D. and Little D.; in this case, issue may be taken *debors*, which manor the conusor intended to pass; for, that is matter of fact not apparent in the fine, whereof the Court cannot take cognizance; but it stands well with the fine, and shall be tried by the jury. But, if a man by deed, make a gift to *one* of the sons of J. S. who has *divers* sons, or, if the words in the limitation of the estate were *to* one and his heirs; in the former case he can-
not

Vid. 11 E. 4. 2 a.

not aver which son he intended, because, by judgment in law, this gift is void for uncertainty upon the face of it, which cannot be supplied by averment; nor can an averment be made, in the latter case, that the intent of the parties was that the feoffee should have but an estate to him and the heirs of his body; for, such averment would be against the judgment of the law, which appears to the Court upon the view of the deed.

Now, upon exactly the same principles, it is held that, if a man has two sons, both called by the name of *John*, and, conceiving that the elder, who had been long absent, is dead, devise his land, by his will in writing, to his son *John* generally, and, in truth, the elder is living; in this case, the younger son may, in pleading or in evidence, alledge the devise to him, and, if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he, at the time of the will made, named his son *John* the younger, and the writer left out the addition of the younger; for, Lord *Coke* says, no inconvenience can arise if an averment in such case be taken in case of a devise by will, because he who sees such will, whereby land is devised to his son *John*, cannot be deceived by any secret invisible averment; for, when he sees the devise to his son *John*, he ought,

Cheney's case,
5 Rep. 68 b. et
vid. 2 P. Will.
137-

ought, at his peril, to inquire, which *John* the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent.

Vid. 2 P. Will.

137.

¶ Ver. 231.

And the law would be the same, if there were two persons both named *J. S. of Dale*, and one devised his land to *J. S. of Dale*; parol evidence would be admitted, in such case, to prove which *J. S. of Dale* was intended by the testator. And the rule would apply with equal force, if the ambiguity arose from there being two manors or two estates of the same description; for, in all these cases, the variance is in matter of fact, which lies in averment.

Vid. Green v.
Proude, supra
14.

So parol evidence was admitted to prove, whether an instrument was meant as a will or as a deed.

Supra, et 3 Ch.
Rep. 98. S. C.
2 Vern. 624,
625.

But, an averment, in case of a will, shall not be of intention, any more than in cases of deeds; because, that doth depend on the words. Thus, Mr. Justice *Tracy*, in delivering his opinion on the case of *Strode* and *Lady Falkland*, took a difference between a void devise on the face of it, and a doubtful and uncertain one, and, thereupon, put the case of a devise to one of the sons of *J. S.* he having several; this, says he, is entirely void, and can never be made good; it must

must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain it; for, the ambiguity appears upon the face of the will itself, and not on matter of fact out of it. Upon the same principle, it was adjudged in the case of *Morris and Maule*, where G. seised in fee of the manor of R, made a gift thereof unto S. in tail, and in 3 Hen. VII. a recovery was had against S. to the use of him and his heirs, then S. seised in fee of the manor of R. made his will, and thereby devised this to his wife for life, and afterwards to the use *rectorum bæredum, secundum antiquam evidentiam*, and it was averred, that no other evidence was but this. It was said that this was *cæca intentio*, it did not appear "heirs of whom were meant." He should have said *suorum* or *meorum*; for the omission of this, the same was both *cæca et maneа intentio*; because there wanted in the will words of *demonstration*, whose heirs he meant and intended; for it might be heirs of a stranger, *secundum antiquam evidentiam*; and resolved, that no averment would help this, for none could tell what he meant by these words; and, therefore, it was adjudged, that nothing did pass by this will, but that the land should descend unto the heir.

49 E. 3 PL. 4.
Lord Scrope's
case, cited
2 Bulst. 180,
by name of
*Morris et
Maule.*

But,

But, to return to the instances in which averments may be received.

Per C. Jus. Holt,
1 Salk. 7. Pl.
16. et 6 Mod.
199.

It was said by Lord Chief Justice *Holt*, in the case of *Lepiot and Browne*, that if father and son were both called A. B. and a devise were made to A. B. and the devisor were proved not to have known the father, the devise would go to the son.

Minsell v.
Minsell,
1 Ark. 411.

And, in the case of *Minsell and Minsell*, L. uncle of R. M. who had R. M. his eldest son, and J. his second son, and several other children, devised an house to R. M. eldest son of my nephew R. M. and the first heirs males of his body lawfully begotten, and the heirs males of his body, and, in default of such issue, gave, &c. to the *second son* of the said R. M. and the heirs males of his body and their issues, remainder over. The testator's interest in the house was in reversion, and did not take effect in possession till many years after the testator's death. R. M. the first devisee, died without issue. J. entered and died, having devised the house to his younger son, in prejudice of his elder son: and the question was, Whether, in the devising words "*to the second son of the said R. M.*" the son of the nephew R. M. was meant, or the son of

of the nephew's eldest son? And Lord *Talbot*, Chancellor, on an appeal from a decree of the Master of the Rolls, directed an issue to try the matter of fact, which of the two persons was meant by the testator; saying, that it was a matter that lay properly in averment, and was determinable by circumstances, proving the intention of the testator one way or other. But, no evidence being forthcoming, the case was afterwards brought before the Court to take its opinion on the legal construction of the words.

So, where B. seised in fee of a real estate as heir on the part of his mother's mother, and being also seised in fee of a very small estate as heir to his own father, devised all these lands to trustees and their heirs, in trust to pay several annuities and charities, after payment of which, he devised the residue of the rents and profits of the estates to his own right heirs of his mother's side for ever; the question was, Who should be intitled to the residue of the rents and profits, whether the heir of the mother's father or the heir of the mother's mother? and it was insisted, that parol proof should be read as explanatory of the testator's intention. It was objected that, in the case of land, where the statute required that the will should be in writing, there

*Harris v. Bishop
of Lincoln,
2 P. Will. 136.*

ought not to be any parol proof. But, *per King, Chancellor*, in this case parol evidence of what the testator said or directed, when he ordered the will to be made, might be admitted by analogy to the cases where there were two persons of the same name or the like; for here, there were two heirs of the mother's side, one who was heir of the mother's father and the other heir of the mother's mother, consequently, the Court might well admit parol evidence to shew which heir of the mother's side was intended. And the depositions of two witnesses were accordingly read.

Hampshire
v. Pierce,
2 Vez. 216.

Again, where D. by her will gave two legacies, one of 100*l.* the other of 300*l.* in this manner; "I give, direct, limit, and appoint 100*l.*" other part of the said trust-money, to the four "children of my late cousin E. B. within six "months after my decease, equally to be di- "vided between them; and if any or either of "them should happen to die under twenty-one, "or unmarried, their share or shares shall go to "the survivors of them." At the time of making the will, the situation of E. B. was this; by a former husband P. she had two children; by a late husband B. she had four children. All the children were living at the death of the testatrix. Parol evidence was offered to shew that the tes- tatrix

tatrix meant the four children by B. This was objected to on the ground, that the admission of parol evidence had been confined to cases where there were two persons or things of the same name, and could not be carried further. But, *per Curiam*, wherever there are several persons or things of the same name or kind, and, from thence it becomes doubtful and ambiguous which the testator meant, and, unless some reasonable light is let in to determine that, the will must fall to the ground, parol evidence may be admitted; as, where there are two sons of the same name; for, when admitted in such case, it is not to contradict the words of the will, *but to let in light so far as is agreeable to the words* to enable the Court to support the act done. Upon the same principle here is a proper ground to admit an explanation of this fact, which were the four children meant; for, that does not contradict the will, but determines which of the four children were to have that benefit. Accordingly, parol evidence was admitted, that the testatrix declared she had provided for Mrs. B.'s four children; which shewed plainly, that she meant the four children of Mr. B. *those he had by his wife*, which explained what she meant by the four children. And it was proved also, that she put a negative on the other two, saying, "that she would not give to the others,

others, being the P.'s, any thing, because their own father had given them a good fortune.

And, if words of an equivocal sense be used, a parol averment will be received to direct the application of them.

Lane v. Cooper,
Moore 105.

It was so held as to a fine, in the case of *Lane and Cooper*, where H. seised in fee, suffered a recovery to S. and F. to the intent that they should make an estate to H. and E. his wife for their lives, the remainder *seniori pueri* of the body of the husband in tail, remainder to K. in fee; and then H. and E. levied a fine to the use of themselves for their lives, the remainder to the use of the eldest child of his own body in tail, the remainder in fee to K. Then E. died, and H. took another wife, by whom he had issue first a daughter, and afterwards a son, and then he died. And one question was, Whether any averment lay for the daughter against the fine, to say, that *seniori pueri* in the fine, was intended *the eldest child*? and it was agreed by all the Court, that an averment lay; because it was consistent with the fine to add matter which explained these words one way or the other.

Attorney General v. Hudson,
1 Will. 674.

Again, where one made his will giving 500*l.* to the charity school, and several pecuniary legacies

gacies to his poor relations, and died. And there was a free-school which was a charity-school, and also a charity-school by subscription. The question being, To which this bequest was intended? It was held that it was intended for the latter, upon the proof that the testator took great delight therein, and had declared he would leave them something at his death.

So, where a testator makes use of a general term, as the word "*Relations*," a parol averment to establish the fact, that he knew particular persons standing in that capacity were living, is admissible, but it cannot be carried one jot further. It must not be used to prove instructions of the testator after the will was reduced into writing, nor as a declaration of who was meant by the written words of the will. And though this is a nice distinction, yet it is a distinction in the reason of the thing; because no mischief can arise from admitting it.

Thus, in the case of *Goodinge* and *Goodinge*, where a man devised a legacy to such of his nearest relations, as his executors should think poor, and objects of charity. Evidence was offered to be read of the testator's intention not to confine the term "*relations*" to the rule of the statute of distributions: but Lord *Hardwicke*

Goodinge vers.
Goodinge,
1 Vez. 231.

would not suffer it to be read for that purpose: then evidence was offered of the testator's having poor relations in *Salop*, and that he knew thereof, and Lord *Hardwicke* admitted it to be read to establish that fact, *but to go no further*, taking the distinction above-mentioned. And, it being read, his Lordship accordingly said that it signified nothing; for, that these relations in *Salop* could not be let in without rejecting the word *nearest*.

And, from the particular nature of the instrument, averments respecting devises are more favored than averments respecting deeds; for, in the latter case, if the demonstration of the persons by name be mistaken, though, as to description they be right, the deeds will be void. As if one grant land to J. S. son and heir of G. S. and it be true that he is son and heir to G. S. but his name be T. S. this is a void grant. But, in the case of a devise, all that is necessary is to shew that the person intended is described. And, therefore, where a testator, by his will, gave an equal share of his real estate to his two sons, James and Charles, and it was urged that the devise was not good because the testator had mistaken the devisees's names (who were his illegitimate children) and they consequently could not take. Lord *Hardwicke* said that the law was otherwise; for, if a man was mistaken in a devise, yet if a person

Pac. Max. 107.
Sedvid. 11 Rep.
281.

Rivers's case,
1 Atk. 410.
Pitcairne vers.
Brace, Finch
403. Gynes v.
Kinnerley,
1 Freem. 293.
Vid. 2 P. Will.
142. et note
distinction
there between
devise and
testament.

person was clearly made out by averment to be the person meant; *and there could be no other to whom it might be applied*, the devise to him was good.

So where a testator described a legatee by a wrong name which she never bore, parol evidence was allowed by the Master of the Rolls to shew that the testator knew such a person, and used to call her by a nick-name.

Cited by Lord Hardw. in the last mentioned case, et same per same,
2 Atk. 240.

And, where a devise was to a son by name, and his christian name was mistaken, but it was added, in the service of the Duke of Savoy; parol evidence was admitted to ascertain the son in the service of the Duke of Savoy, and this son, though his name was mistaken, had the estate.

Cited per Lord Maclesfield Chan. 8 Vin. Abr. 197. Pl. 33. 2 Eq. Ca. Abr. 415. 6.

Again, where a testator gave the residue of his estate to the poor of the parish of K. in the county of L. and it appeared that this parish of K. was not in the county of L. but in the county of N. the Master of the Rolls was of opinion, that parol evidence ought to be admitted to help out the description of the parish, and that this was a settled rule. That therefore the parish of A. in the county of N. was well intitled under the will.

Brown vers.
Langley, 2 Eq.
Ca. Abr. 416,
14.

But, if the person to take be not in some sort described in the devise, no averment will be admitted to shew who was intended; because in such case the ambiguity appears on the face of the instrument.

² Vez. 217,
218.

Thus, Sir John Strange, Master of the Rolls, in citing a case where the executor constituted in a will was, “*my nephew Robert New*,” and in the engrossing they had made it “*Nune*,” and parol evidence was admitted, and thereupon *New* was declared the person meant, observed, that this would hardly have done, if it had not have been for the relative words *my nephew*, and its appearing that *New* was his nephew, and that he had no such nephew as *Robert Nune*.

• Castleton *vers.*
Turner, cited
² Vez. 216,
217.

Again, where a testator had made dispositions in his will to several, and but two women were mentioned throughout the whole will, viz. his wife and his niece, and, in the latter part of the will, a particular estate was devised to “*ber*” for and during her natural life. The question was, Whether parol evidence should be admitted to shew to which of the two women “*ber*” referred? But the Lord Chancellor would not receive it, thinking the offering it was an attempt contrary to the principles of the Court; because it would tend to put it in the power of witnesses to make

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wills for testators. And his Lordship held, that though "ber" was a relative term, it related to the wife, upon the ground that throughout the will in other places "ber" seemed to relate to the wife.

And it seems, that no averment will give words, used in a will, a different sense from that which they obviously carry on the face of the instrument. Thus, though the word "Son" is applicable to a grandson as well as to a son, if there be no son in being; yet, where the word Son in a will appeared clearly, from the context, to be applicable to a son only, and not to a grandson, because both son and grandson were named in the instrument, no parol averment could be admitted to explain it otherwise; because that would have been to contradict the written will by evidence dehors. The case of *Steed* *Infra*, and *Berrier*, cited in a subsequent part of this work, seems fully to justify this conclusion.

Nor will the Court, by averment, supply any thing that is not before written.

Thus, where 200*l.* were given under the will of L. to the Ward of Bread Street according to Mr. —— his will. On a bill filed for the direction of the Court as to the application of this

Baylis et al. v.
Attorney Ge-
neral, 2 Atk.
240.

charity, evidence was offered to shew whose name was intended to fill this blank ; but Lord Hardwicke said, that he did not remember any case wherein the Court had gone so far, as to allow parol evidence of the intention of a testator where there was only a blank, and therefore would not permit it to be read.

Courts of law and equity have also carried this rule, as to receiving averments of facts dehors the will, still further ; for, we have, hitherto, only seen it in instances where the ambiguity has been, either as to the person or as to the subject matter devised : but we shall now advert to cases where courts have availed themselves of the benefit of such averments, in order, thereby, to give a construction to words of equivocal import expressive of the quantity of interest, or of the extent of the subject matter of the devise ; distinguishing between cases where the evidence squares with and those where it contradicts the language of the will.

The first instance I have met with of this nature is the case of *Kerman and Johnson*, where one devised to J. S. his whole estate, paying his debts and legacies ; and died possessed of goods and chattels to the value of five pounds only, and

*Kerman vers.
Johnson,
Styles 281,
293, 1651.*

and seised in fee of divers lands, and was indebted forty pounds at the time of his death. And the question was, Whether the fee-simple of the lands passed by the devise? And one ground of argument, upon which it was contended that it passed, was, that, if it did not pass, the debts and legacies could not be paid, according to the express intent of the testator. To this it was objected, that the Jury's finding of the value of the debts and legacies was to no purpose, because the will could not be helped by the averment of the Jury. But, it was replied, that averments, if they stand with the will, may be received to make the testator's intent to appear; and, besides, that this was not an averment only, but a *true stating of the case* to find out the testator's meaning. And, on the first argument, *Rolle* doubted how the verdict should supply the will if it were defective; for, that was only to make the *intent* of the will certain. But, on the second argument, *Rolle*, Chief Justice, held, that the lands did pass; for, so he said the common understanding imports, and the words did go to the value of the estate. First, It comprehended the thing, *to wit*, the land. Secondly, the extent of the estate given, viz. fee-simple; and so it should be here intended, and the words "*paying his debts and legacies*" did enforce this construction; for they were to be paid presently,

which could not be if the lands passed not in fee, and so the averment was but to supply the meaning of the testator, and stood very well with the will, and *Jerman, Nicholas and Ash*, Justices, were of the same opinion.

Moor v. Price,
3 Keb. 49,
1673.

So, in the case of *Moor and Price*, which was an issue out of Chancery on a *devisavit vel non*, the question was, Whether a devise to P. "of all the testator's estate, paying 400*l.* a piece "to his sisters," carried his land. And, it appearing that the personal estate was not sufficient to satisfy the legacies, it was held that his real estate must have been intended to pass. And the preceding case of *Kerman and Johnson* was relied upon, in which it was said to have been resolved that this was no averment dehors the will, but was consistent with and explanatory of it.

Wyld's case,
6 Rep. 16,
1595.

So, in *Wyld's case*, the special verdict found, that he and his wife, at the time of the will made, had a son and a daughter, which was an averment of a fact out of the will, upon which the Court argued thus. They first considered what would have been the effect of the limitation, which was "to *Wyld* and his wife, and, after their decease, to their children," had it been in a deed. And they clearly held that all the devisees would have been only tenants for lives. Then they said

said that, in the principal case, for as much as by the judgment of the common law on the like words in a conveyance, it would have been but, an estate for life the remainder to their children for life, it followed that the intent, and not the words only of the devisor, ought to make it an estate tail. Then this intent should be manifest and certain and so expressed in the will, but, in this case, no such intent appeared; for, possibly his intent was agreeable to the rule of law. But it was resolved for good law, that, if A. devise his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues shall take, and, as immediate devisees, they cannot take, because they are not *in rerum natura*; and, by way of remainder, they cannot take, for that is not his intent; because the gift is immediate, therefore there such words shall be taken as words of limitation. From which resolution this conclusion follows, that, in order to decide what construction shall be put upon the word Children, it being an equivocal term, resort must be had to matter of fact dehors consistent with and explanatory of the will, and which lies in averment.

And the value of the thing devised may be ascertained by averments, in order thereby to throw

throw light upon the meaning of equivocal language.

Bucher's case,
Gouldsb. 99.
Hil. 30 Eliz.
1588.

Qn. Coke.

So, where it was found on a special verdict that S. (seised of the manor of H. in the parish of —— whereof the tenements in demand were parcel, and of divers other tenements within the same parish, and within a place known in the same parish which was neither town nor hamlet called E., in which S. had a tenement which had lands time out of mind appertaining thereunto, lying as well in E. as in H. which tenement was in the tenure of B. by copy of Court Roll according to the custom of the manor) devised to his brother, "after the death of B. all that his tenement with the appurtenances wherein B. dwelleth *in E.*" The question was, Whether the lands in H. pertaining thereunto should pass or not? And the famous *Cook* argued, that it should. And one reason urged by him was, that wills should be taken by meaning, and, upon this devise, he said, four pounds rent is reserved, and the ancient rent is but forty-five shillings, and, if the land should be racked it is all worth but 5*l.* a year, and, being held in *capite*, the devisee could have but two parts; and it could never be intended that it was the devisor's meaning to have the devisee pay 4*l.* for the lands in E. which were not worth so much; consequently, he said, sometimes the value is considerable in a will, and cited 4 Ed. VI. and

7 Ed. VI. and therefore, he said, the devisee ought to have the whole, and of this opinion was the Court.

And, agreeable to this opinion was the decision in the case of *Reak and Lea*. There A. being seised of 10*l.* *per annum* lands in possession, and the reversion of 34*l.* *per annum* more expectant upon an estate for life, devised a legacy of 20*l.* to B. to be paid in twelve months out of his lands, and devised 50*l.* to C. to be paid in two years, and 50*l.* to D. to be paid in like manner out of his lands, and, having two sons, W. and R. *devised ALL his LANDS to R.* And one question was, Whether R. took a fee? And it was contended, and so held by the Court, that he did; because it did appear that the sum to be paid was more than the profits of the land would amount unto by the time the money became payable; for the land in possession was but ten pounds *per annum*, and twenty pound was to be paid in a twelve month, and the Court could not supply a supposition that the 34*l.* a year in reversion might fall in, that being a very foreign intendment.

So where one devised all his personal estate to his wife for life, and what she had left at the time of her death, it was his will, and he did desire her

Reak v. Lea,
1 Freem. 479.
Trin. 1679.
S. C. 2 Eq. Cas.
Abr. 298, 2 et
vid. 2 Burr.
1898, value of
the estate con-
sidered as an
argument to
shew it was
meant to pay
in fee.

Cowper versus
Williams,
Pre. Chan. 71.
1697.

her that it might be equally distributed between his own kindred and hers. The question was, What interest the wife had? It was contended that she had but the use of the personal estate during life, and that the words "*what she had left*" should be understood to apply only to perishable goods. But, on the other hand, it was urged, that the estate left was so small that the wife could not live upon it without spending the stock. *Et per Curiam*, if that be so, it may alter the case; therefore let the Master state the value of the personal estate, and then the Court will give further directions. And a similar reference to the Master was made in the case of *Purse* verf. *Snaplin*, 1 *Atk.* 414.

Cole v. Rawlinson, 1 *Salk.*
234, 2 *L. Raym.* 831.
Rep. T. Holt,
744, 1702.
1 *Brown's Ca. Parl.* 108.

Then came the case of *Cole* and *Rawlinson*, in which a special verdict found, that B. seised of the remainder in fee of the Bell Tavern expectant on an estate tail, and possessed of other leasehold estates, made her will, and, thereby, devised in this manner: *I give, ratify, and confirm all my estate, right, title, and interest* which I now have, and all the term and terms of years which I now have or may have in my power to dispose of after my death in whatever I hold by lease from J. F. and *also the house called the Bell Tavern* to J. B. And, after other devises, the testatrix bequeathed as follows: "And all other my real and personal estate,

"estate, not hereby by me before disposed of, I give and devise the same unto my sons R. D. T. D. and C. D. their executors and administrators." J. B. was the tenant in tail of the Bell Tavern, and heir to the testatrix's husband, but not to herself. And the question was, What estate J. B. took in the Bell Tavern by this devise? And *Powell, Powis, and Gould*, Justices, held, that he took an estate in fee. First, because it was but one sentence coupled by the words *and also*, and governed by one verb, whereby the preposition *in* was carried unto the Bell Tavern; so that it was a devise of all her estate and interest in her leasehold estate and also in the Bell Tavern: and they said the words ought to have this construction since they were capable of it, because this was certainly the intent of the testator, who could not design so vain and useless an estate to the devisee as an estate for life after an estate tail. Secondly, because the words of the will were rather a description of the testator's estate than of his lands, and the preposition "IN" was understood as if it had been "in the Bell Tavern," and, put into Latin, it would stand *ac etiam domo vocato, &c.* and suppose a transposition of words, which was allowable to serve the intent of a will, then the matter would be plain; for then it would be, *I give my term of years, and all the estate, right, and title I have in*

my

my term, AND ALSO IN THE BELL TAVERN. But Holt Chief Justice, *contra.* for he said, the intent of a testator would not do, unless there were sufficient words in the will to manifest that intent; neither was a testator's intent to be collected from the circumstances of his estate and other matters collateral and foreign to the will, but from the words and tenor of the will itself: and, if once it were permitted to travel into the affairs of the testator and leave the will, we should not know the mind of the testator by his words but by his circumstances, so that no lawyer could know how to expound it. Upon the will it would be so, but with the matter found in a special verdict it would be otherwise. And his Lordship said that it was a certain rule that a devise of lands to H. *without further words* passed but an estate for life, and this held good as well as to lands *in reversion* as in possession, unless it were devised as a reversion or a particular estate taken notice of; for, *then*, the intent might appear upon the face of the will. But, if the words were general and without regard to the nature of the thing, it was otherwise; for the will should not be construed from the nature of the thing, which was extrinsical, but from the words of the will. Ask a lawyer what passed, he would say an estate for life; for he could not know that it was a reversion, and though it were a fruitless estate, and would

would signify nothing, yet that did not appear until found, and therefore when found was not to be regarded. And, as to turning it into Latin, he said the preposition “*in*” might be necessarily understood in Latin but not in English; and the conjunction was not so far a copulative as to take in the preposition “*in*,” though it took in the verb; and as to transposition of the words, he did not know the court could transpose words that were good sense. If the will had been nonsense, then the Court might transpose to make it bear a meaning; but to displace the words of a will where they were intelligible, was to alter the will and the sense of it. And his Lordship concluded against the devisee. But, the three *puisne* Judges being of a different opinion, he had judgment that the fee in the Bell Tavern passed, and that judgment was afterwards affirmed in the Exchequer Chamber by three Judges against the opinion of *Trevor* Chief Justice; and again on a writ of error in Parliament.

I have been rather prolix in the statement of this case and the arguments thereupon, because, from the whole taken together, it is evident that the decision was governed entirely by the collateral facts made out by averment on the special verdict; for, it appears clearly, from the arguments of the *puisne* Judges, as well as from

Lord

Lord *Holt's* argument, that the difficulty arose from the extrinsic circumstances, and, that, independant of them, the case would have been plain and clear, and must have been decided not to carry a fee. And the state of the subject devised was also the principal ground relied upon by the devisee in the House of Lords. So that this case may be considered as a precedent of the highest judicial authority on the point now in discussion.

King v. Philips,
1 Vez. 232.
Et vid. Stapleton v. Colville,
Rep. T. Talbot
202.

And, where the question was, Whether K. could take as a creditor under articles and also as a legatee under a will, it was urged that the legacy was of equal value with the whole personal estate, and, consequently, if allowed, would defeat the intentions of the testator of giving any thing to other legatees: Lord *Hardwicke* said, that this legacy being so near in value to the personal estate, he would do what Lord *Jeffries* and Lord *Cowper* had done in such a case, direct an account to be taken of the value of the personal estate at the testator's death *and at the making the will*, which fact might give some light as to the intent, and was a fact necessary to be known before he determined the case.

The latest case that has been decided on this point, is that of *Fonereau and Pointz*, in which
case

case most of the adjudications upon this question were cited and considered by the Court, and its final decision given conformable to the principle we have been endeavouring to establish, viz. the general admission of any averments respecting facts that may throw a light upon obscure and ambiguous words of equivocal import.

As the question upon this case arose upon personal estate, it is necessary to remind the reader that, in all cases where the personal fund is of a size that cannot be disposed of by a parol will, the principle as to evidence applicable to that equally extends to real estate; the true question being, how far a written will admits of parol averments to aid its exposition.

In the case alluded to, the testatrix I. M. by her will, gave the following bequests. "I give to M. P. THE SUM OF 500*l.* stock in long annuities. I give to M. H. the sum of 500*l.* stock in long annuities; I also give unto Miss I. B. the sum of 200*l.* stock in long annuities, the INTEREST THEREOF to accumulate until she shall attain twenty-one and then the whole TO BE TRANSFERRED to her by my executors. Also I give unto Miss H. D. the sum of 100*l.* stock in long annuities, THE INTEREST thereof to accumulate, until she attains twenty-one, and then the whole TO BE

Fonereau verf.
Pointz
Brown's Ca.
Chan. 472.

TRANSFERRED to her by my executors—And all the rest and residue of my estate and effects, both real and personal, whatsoever, and wheresoever, I give, devise, and bequeath the same, and all and every part thereof, unto my said two nephews M. F. and T. F. their heirs, executors, administrators, and assigns' for ever." It turned out that the testatrix had only 120*l.* a year long annuities. And the question was, Whether the legatees should have the respective sums given to them, raised by sale of so much of the stock as would produce the same, or whether they were intitled under the will to annuities of the sums respectively given them, and consequently to divide the 120*l.* a year between them, leaving nothing to the residuary legatees? And this depended upon the question, Whether, in this case, the Court could let in averments of the state of the testatrix's property at the time of her decease? Upon the first hearing of the cause, Lord Thurlow was of opinion that parol evidence could not be admitted; because, the testatrix having used words so near those a man of business would make use of to dispose of so much *per annum*, the Court were bound to declare the legatees intitled to the things as described, viz. annuities. But, on a re-hearing of the cause, his Lordship changed his opinion. He said he should have thought that, had the will stood clear of all other criticisms,

cisms, although it were not an accurate description of 500*l.* joint interest in the annuities, yet it was a sufficient one of 500*l.* stock in the long annuities; at the same time, it was impossible not to observe that the expression "the sum of 500*l.*" was going out of the way. But accurate phrases were not called for; and if the words were found to express the intention of the testatrix, that was sufficient, and if it had stood by itself, it was sufficient to shew what the words meant, "an annual sum of 500*l.*" The difficulty occurring was this, that she had been speaking of a sum of 500*l.* which expression, if standing alone, ought not to be interpreted by any other context, but must take its *whole complexion* from the word *stock*: but, if it stood with the context to admit of any other construction upon it, he must consider what the testatrix meant by the whole of the words, "the sum of 500*l.* &c." and the additional words, "the INTEREST THEREOF to accumulate." According to the natural sense of the words, "sum of 500*l.* given to A. at twenty-one, and the INTEREST thereof to accumulate," he must suppose the first sum to be the principal sum, and the second the interest of the principal sum. It had been contended that the word "Stock" in the annuities, could not mean the annuity; because it would extend to the 3 per cents. which were annuities, but there

the stock was denominative of the *capital* sums; otherwise as to the long annuities, they were denominated so by the annuity; and the circumstance of their being both annuities made it very probable, that if a person were to speak of it as a gross sum, he would speak of the stock, and not of the annuity merely. So far practice might warrant, that if the words had ended with annuities, without speaking of interest, there would have been no necessity for evidence to have controled them: but the second part of the sentence, "and the interest thereof to accumulate," raised a doubt, whether *she meant a sum* as producing interest, or the stock itself. The term Interest was not a proper phrase, but this was not a grosser inaccuracy than those in the rest of the will: the word Transferred had been relied on as a technical phrase, but it weighed nothing, because the thing to be bequeathed, was not the stock, but the produce of the stock together with the stock itself. The interest, which was the growing produce of the legacy she meant to give, was to be laid out in order to accumulate, she must have meant by the word annuity something. There was no doubt if the word Stock had been left out, but the meaning would be that the sum of 50*£l.* was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain

attain twenty-one. This being the doubtful interpretation upon the face of the will; the question arose, Whether the state of the testatrix's fortune was not applicable to the construction of the will? It appeared by some other parts of the will, that she was extremely anxious to make an ample provision for the family of the *Fonereaus*; considering then the situation of her fortune, it was perfectly inconsistent to say, that she could mean to give *ten times more than she was worth* in legacies. His Lordship's opinion therefore was, that the judgment must be reversed, and that he could let in the evidence of the value of the estate, not to *controul the bequests* which the testatrix had made in words themselves distinct, nor to controul a bequest which she had made of a subject, which she had accurately described; but, because the words she had used in the description were, upon the whole of the context, uncertain *whether she intended it as the interest of the gross sum to accumulate, or 500l. per annum.* The peculiarity of this will furnished sufficient doubt to warrant the admission of collateral evidence to explain it, and, if so, the statement of the testatrix's fortune, was applicable to the purpose of such an explanation,

The reader, I trust, will not complain that the detail of the cases on this particular point has

been tedious, when he recollects that, after so much discussion as he has seen had preceded this point, it furnished ground for one of the most elaborate and refined judgments that is to be found in Mr. *Brown's Reports of Cases in Chancery*, nor will he grudge being delayed a short time longer whilst we collect the several conclusions that this string of cases furnish.

Supra.

First. It is clear from the cases of *Kerman* and *Johnson*, *Moor* and *Price*, and *Cooper* and *Williams*, that where a testator makes use of terms of equivocal import, all averments of facts relating to the circumstances of the testator, which will supply his meaning and stand well with the will, may be admitted and argued from by the Court.

Supra.

Secondly. That courts of law or equity, in order to throw light upon doubtful and ambiguous phrases, may inquire into, and receive averments respecting the value of the property devised, which was done in *Bucber's case*, and in the cases of *Reak* and *Lea*, *Cooper* and *Williams*, and *Fonereau* and *Pointz*.

Thirdly. That where the question in a devise arises, upon the sense in which a testator used words capable of being received either as words of

of purchase or limitation, averments respecting the state and condition of the testator's family may be received to throw light upon the subject, as must be done in all cases similar to *Wyld's* case.

And Fourthly. The cases of *Cole* and *Rawlinson*, and *Fonereau* and *Pointz*, clearly justify us in concluding that words, though clear in themselves and not equivocal nor attended *prima facie* with any apparent ambiguity, may, as applied to a testator's property, have light thrown upon them by averments respecting the state of that property, and, thereby, receive such a construction as will meet the state of that property, though contrary to what they technically import; for, it is plain from the arguments used on all sides, in the case of *Cole* and *Rawlinson*, that there was no ambiguity on the face of the will, considered without relation to the extrinsic circumstances respecting the nature of the estate and the preceding interest of the devisee. And, in the case of *Fonereau* and *Pointz*, Lord *Thurlow* said he should have thought the description sufficient had it stood clear of all other criticisms, *which* criticisms did not occur until brought on the tapis by the statement of the testatrix's fortune, which was matter of external evidence. Consequently the external evidence as to the state of the property must have been received into the mind before the ambiguity

appeared, and, then, if this species of external evidence is not admissible to controul the construction independant of any ambiguity on the face of the instrument, the question will be, Whether an ambiguity, arising out of external evidence as to the state of the testator's property and not out of the will, *which* external evidence is *not* admissible unless to throw light upon an equivocal expression in the will, shall be considered as raising an ambiguity *which* ought *not* to have been admitted to occupy a place in the *mind* of the Court, unless it found its way there through the *medium* of the will as it stood *clear* of all external circumstances? But the true principle of parol averments, as applied to wills, is, that nothing can, by parol evidence or averment, be put upon a will that does not *previously* stand there, but that *any* light may be thrown upon what stands there by averments of all distinct facts that *stand well with* and *have their existence independant* of the effect or non-effect of the words of the will; for, none of the mischiefs which were intended to be prevented by the statutes of wills or frauds that required these dispositions to be in writing were to be apprehended from this species of evidence; therefore, in such cases, the Courts, from the time of enacting those statutes to the present hour, have been satisfied if the letter of them was complied with;

with; that is, if the devise or bequest be in writing, and stands clear of all parol declarations of intention or inference of intention from parol declarations.

But, *no* fact that does not stand well with the words of the will can be admitted; because every devise or bequest must be in writing, and whether a parol averment enlarge or restrain the words of a will, they contradict it, and doing so, if the will, *as explained by such fact*, stood, the whole will would not be in writing.

Thus, there being, in the before-mentioned case ^{Supra 494.} of *Hampshire and Pearce*, a subsequent legacy at a great distance in the will from that already mentioned, whereby the testator further gave, limited, and appointed *unto the children of his late cousin E. B.* the sum of 300*l.* parol evidence was tendered to shew that it was intended for the four children to whom the preceding legacy was proved to be intended to be given: but the Master of the Rolls refused to give any weight to it as to that; because, as to this legacy, the devise was so expressed as to take in *all the children*; therefore, whatever the devisor's intention might be, *the Court would not go out of the will to admit it, because that would be to contradict the will.*

Brown v. Selwin, Rep.
T. Talb. 240.
Et vid. S. L.
Lowfield v.
Stoneham,
2 Strange 1261.
Earl of Inchiquin v. O'Brien,
cited ibid
Chamberlaine
v. Chamberlaine, 2 Free-
man 52.

So, in the case of *Brown* and *Selwin*, where a testator, after several devises, goes on thus: "As for the rest, residue, and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways intitled to, which I have not herein and hereby devised." I give and bequeath the same, and every part thereof, and all my right, title, and interest therein and thereto unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, according to the true intent and meaning thereof, his or their heirs, executors, administrators, and assigns, as tenants in common and not as joint-tenants. One of the executors was, at the time of the testator's death, indebted to the testator by bond in 300*l.* principal money, besides interest. And the question was, Whether the residuary bequest discharged and extinguished the debt? and parol evidence was offered to prove that the testator designed to give this money to the executor who owed it, and gave the person who drew the will instructions in writing accordingly, but he refused to make mention thereof in the will, insisting, that the bond would be extinguished and released of course by his being appointed executor, and that a counsel's opinion had been taken thereupon to satisfy the testator's doubts, who confirmed what the drawer

of

of the will had said; in confidence of which it had been signed and published by the testator as it stood. But, Lord *Talbot* was of opinion, that the debt remained unextinguished, subject to go according to the residuary clause between the two executors: and his Lordship said that, although he privately thought it was intended the 3000*l.* should be extinguished; yet, privately thinking so, he was not at liberty to make a construction *against* the plain words of a will. In all cases where parol evidence had been admitted, it tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will: and he decreed accordingly. And his decree was affirmed on appeal to the House of Lords on the same reason, viz. that it was an examination to contradict the words of the will.

So, where A. devised particular lands to his executors, to be sold for payment of all his proper debts, and gave direction to the person who drew the will, to give all his personal estate to his executors, but, by mistake, that was omitted, though proved by the person who drew the will; Lord *Harcourt*, Chancellor, decreed the executors to account for the personal estate, saying he must construe the intent of the testator out of the *words* of the will and not upon parol evidence;

Gale v. Crofts,
8 Vin. Abr.
195. Pl. 25.
2 Eq. Ca.
Abr. 415, 5.

evidence ; and he distinguished between this case, where the parol evidence was to control the common law and give the personal estate to the executor, which was assets at common law to pay debts, and those where the evidence went in support of the common law.

**Osborne vers.
Villiers. 2 Bac.
Abs. 426.**

Again, where A. being possessed of a considerable personal estate, made his will, and, thereby, devised several legacies, but gave none to his executor; the question was, Whether parol evidence ought to be admitted, to prove that the testator did not intend that the executor should have the residue of his personal estate, but that the same should go according to the statute of distributions? And it was held clearly that no such evidence could be admitted; for, that this would not be to admit evidence to oust an implication, but was to admit evidence to contradict the rule of law, and *what appeared on the face of a will.*

Parol declarations even of a testator are likewise received in all cases to rebut the constructive declarations of a trust put on words contrary to the legal sense of them, which is rebutting an equity; for, in such cases, the estate is in the devisee, and the averment is in support of the *letter of the will.*

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This point seems to have been first agitated in the case of *Crompton and North*, where lands were devised to the executor, to be disposed of for payment of debts and legacies ; and the question was, Whether the residue was a trust for the benefit of the heir at law ? And one question made by the Lord Keeper and Mr. Baron *Wyndham* was, If it were a trust, whether an averment did not lie for the executor and trustee, it being an implied trust, and not within the statute of Henry VIII. of wills ; and the Court declared that the estate being vested in the devisee, he should have been admitted to his proof of the testatrix's parol declaration, if it had been wanting and necessary, which it was not.

North v.
Crompton,
1 Ch. Ca. 196.
22, 23 Car. 2.
et vid. S. C.
at large cited
by Hutchins,
one of the
Lords Com-
missioners,
2 Vern. 253.

The same point was again agitated, upon the general principle of rebutting an equity in the Countess of *Gainsborough*'s case.

There, Lord *Gainsborough* owed debts by mortgage, and, on his death, made the Countess his executrix, against whom a bill was brought by the heir to subject the personal estate in the first place to pay off the mortgage ; parol proof was admitted to shew it to have been his Lordship's intention that his executrix should have his personal estate *exempt from debts*, and that the lawyer, who drew the will, having been instructed

Gainsborough
v. Gainsbo-
rough,
2 Vern. 252,
1691.

structed to insert in the will a bequest of the personal estate to the wife, had replied, there would be no occasion for that, she being to have the personal estate *of course* as executrix; and, thereupon, it was decreed that the Countess should retain the personal estate, and that the heir should not in this case have aid thereof towards paying off the mortgage *notwithstanding that, by the rules of the Court, the same was liable to be so applied.*

Cliffe *vers.*
Gibbons, et al.
2 L. Raym.
3324, 1714

So, where E. W. made her will, and, being seised and possessed of real and personal estate, charged it with the payment of several legacies, and, among others, with 250*l.* a piece to M. and K. and gave the *residuum* over. And afterwards at a future day, by a note, which was deemed a codicil, directed her executors to pay M. and K. 250*l.* a piece. One question was, Whether M. and K. should have each of them two sums of 250*l.* one by the will and the other by the note, or whether it should be considered as a repetition of the same bequest? And upon reading evidence that the testatrix took notice that she had given them 250*l.* by the will, and said she would make it up 500*l.* both sums were, by Lord Cowper, Chancellor, decreed to them.

Docksey *vers.*
Docksey,
2 Eq. Ca. Abr.
506. 1. 1708.

So, where one devised certain lands to his son, and all the rest and residue of his real estate to his

wife and her heirs to the intent to pay his debts and legacies; on a bill by the heir to have the surplus, the Lord Chancellor allowed evidence to be read to shew that the testator's intent was, that his son should have no more than what was expressly given him; and that the reason of the testator's giving his wife so much was, because that the testator talked with the witness about the settlement of his affairs, telling him he designed his heir the same lands which were given him by the will, and that he did design other lands for his younger son; whereupon the witness said, that would be a means to set the two sons at difference, and therefore he had better give them to the wife and depend upon her generosity to the younger son, which advice he approved of and followed: and his Lordship said that such evidence may be read to explain *any implication*, notwithstanding that matter dehors ought not to be averred.

And, in the case of *Littlebury* and *Buckley*, where one, not of kin but a stranger, was made executor and had considerable legacies given him, it was decreed by the Recorder in the Mayor's Court, that, the executor having legacies, the residue was a resulting trust to be distributed according to the statute. But, upon an appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but on the ground

Littlebury v. Buckley,
2 Vern. 677.

ground that parol proof ought to be received in favour of the executor's title, *consistent with the will*. And the proof being full as to the testator's declarations that his executor, though a stranger, should have the surplus, and that the testator's brothers should not have it, it was decreed accordingly.

Mallabar ver.
Mallabar, Ca.
T. Talbot 79,
2335.

Again, where a testator devised all his messuages, lands, and hereditaments whatsoever and wheresoever, in the counties of N. S. and C. unto his sister, E. M. and to her heirs and assigns for ever, upon trust to sell the same, and, out of the monies arising by the sale, to pay debts and legacies, and, subject thereto, gave the rest and residue of his personal estate to the same E. M. and constituted her executrix. A question arose, Whether, upon the will, there was not a resulting trust for the heir; and it was contended that there was not, and, in order to shew clearly that this was the testator's intent, they insisted upon giving parol evidence. And Lord Talbot, Chancellor, said, if this was *res integra*, and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence, but it has been done (and his Lordship cited the two preceding cases) and therefore I now admit it to be done. And the deposition of a witness was read, who gave full evidence of the testator's declarations that

that the executrix, after the payment of the debts and legacies, was to have all the rest of the devistor's estate.

Upon the same principle of the evidence not being contradictory to the will, it has been held, that parol proof may be brought to shew that a devise is meant as a performance of a preceding agreement; for, in such case, the evidence is not made use of to construe the will, *but to explain whether the one thing is a satisfaction for the other.*

Thus, where J. M. agreed to settle 100*l. per annum* on his intended wife, but, finding himself ill, made his will and left her 100*l. per annum*, and then, J. M. recovering, the marriage was soon after had and the settlement carried into execution. After J. M.'s death the widow distrained for 200*l.* a year against the devisee of the estate, who brought a bill to oblige her to take but 100*l. per annum*. Upon the hearing, it was insisted that the testator intended the wife but one hundred pounds a year, and that its being by two different instruments arose only from the change of circumstances; and, to prove this, parol evidence was offered. *Et per Baron Clarke,* it is proper to be read. The question is, Whether here are not two provisions made for

Mascal ver.
Mascal,
1 Vez. 323.

the same thing? It is impossible to come at the facts by which the Court is to judge, but by their being made out by evidence, nor can the party's intent be otherwise proved. The objecting to this would be carrying the rule a great deal too far.

¹ Vernon 45.

It was said, by the Solicitor General, in the case of *Newman and Johnson*, that a parol declaration was sufficient to subject lands to the payment of debts, where a man had but an equity only.

And parol evidence may be admitted in all cases to counteract fraud; because to decide otherwise would be to make the rule instrumental in encouraging *that*, which it is its object to prevent.

Oldham vers.
Litchford,
² Vern. 506.

Thus, where L. made his will, and A. his brother executor, and devised to him his real estate, and thereby willed that his executor, out of his rents in arrear and other his personal estate, and out of half a year's rents and profits of his real estate, after his death, should pay his debts and legacies thereinafter-mentioned: and by his will, amongst other legacies, devised 40*l.* *per annum* to his wife's nephew to maintain him at Cambridge, to be paid by his brother and executor.

tor. The testator dying, the executor alledged he had fully administered the personal estate, as also the half year's profits of the real estate which incurred after the testator's death, and therefore refused to pay the 40*l.* *per annum.* And the question was, Whether the real estate was chargeable therewith or not? It was admitted that the will had made only the half year's rents and profits of the real estate liable. But it was proved by one witness that the executor had promised the testator that he would pay the annuity, otherwise the testator would have charged his real estate therewith; and, upon that evidence, it was decreed at the Rolls for the annuitant, and that decree affirmed on appeal to the Lord Keeper.

But it is an essential ingredient to any relief under this head, that it should be on an accident perfectly distinct from the sense of the instrument.

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R E U D C A C J D E S.

IN the consideration of this part of our subject, I shall first observe, upon the principles, nature, and extent of Revocations, as they stood at common law previous to the statute of frauds; and then endeavour to shew how far they were altered, or any new kind of revocations introduced, by that statute.

At common law a devise of land might be revoked in two ways, viz. first, by a positive act of the devisor revoking the devise, which is an express revocation. Secondly, by some declaration or some equivocal act of the devisor, amounting, in law, to a revocation, or some act of his furnishing ground to presume that his intent to devise must be changed. These are called Revocations in Law.

Express revocations at common law might have been effected, first, by writing; secondly, by parol.

First, by Writing.

As, by a subsequent will or codicil expressly revoking a preceding will.

Secondly,

Secondly, by Parol.

As if one, having made his will in writing, and devised his land to A. afterwards, being sick and on his death-bed, had declared that he did revoke *his will*, and that A. should not have his lands given unto him by his will, or other like words, shewing the devisor's intent to make an express revocation thereof: or, if speaking of his will, he had said, "I do revoke it, and bear witness thereof;" for these expressions would have evinced an immediate purpose to revoke.

But words would not have effected a revocation unless clearly used *animo revocandi*, which must have been made evident by an express reference to the instrument to be revoked; and therefore where a devisor on his death-bed, because his devisee did not come to visit him, affirmed that she should not have any part of his lands or goods, not referring to his will expressly; this was held, *per Curiam*, unanimously, not to be a revocation of the will, being but by way of discourse, and not mentioning it.

So, if the expressions were such as imported only an intention to revoke in future, they would not have been a revocation of a will in writing of land. As if one, saying that he had made his will, added that it should not stand; or

Dyer 310. Pl. 81.
1 Roll. Abr.
615. o. 1.
Vide Cro. Ja.
115. Pl. 2. 497.
Pl. 3. et vid.
Styles 343, 418.

Sympson v.
Kirton, Cro.
Ja. 115. Pl. 2.
Et vid. Cro.
Car. 51.

Cranvell v.
Sanders, Cro.,
Ja. 497.

that he would alter it ; these words would not have been a revocation ; for they are words but *in futuro*, and a declaration what the speaker of them *intends* to do.

Burton et al. v.
Gowall, Cro.
Ellz. 306. Pl. 6.

But a distinction was taken between cases of the last-mentioned kind of VERBA IN FUTURO, referring to a future act, and similar words when they referred to a present resolution ; and, therefore, although, if a man said *I will revoke my will made at A.* this was no present revocation, because it referred to a future act ; yet if a man said, *animis revocandi*, " my will made at A. shall not stand," that had been an immediate revocation ; for it referred to a present resolution : in like manner, as if one said to another, " you shall have my land for three years," this would be a present lease.

Moore 874.
Pl. 1222.

The law was the same if a devisor declared that he would alter or add to his will, and died before any alteration or addition made ; the will would nevertheless stand.

Secondly. By some declaration or equivocal act of the devisor, amounting, in law, to a revocation, or some act of his furnishing ground to presume that his intent to devise must be changed.

By

By a declaration of the devisor. As if one, who had made his will said, *animo testandi*, as on discourse respecting the speaker's will, that J. N. (*who was his heir at law*) should be his heir, that would have been a revocation of a devise to a stranger; for, in such case, the testator's intent to revoke was a necessary inference from his intent that his heir at law should inherit; since the latter could not take place without the former was effectuated: and no further act was necessary to enable J. N. to take; because when the will was revoked, the law gave the land to the heir.

Ford's case,
1 Siderf. 73.
S. C. 1 Keb.
253. Pl. 21.

By some act of the devisor. Acts of the devisor amounting to a revocation, may be either by writing or *in pais*.

First. By writing. As if one, having made a will, afterwards make another will inconsistent therewith, but not expressly revoking it, this will nevertheless be a revocation; for, by making the latter will inconsistent with the former, the former is, in law, revoked; the very making the latter furnishing a fact from which it must necessarily be inferred that the former was intended by the testator not to stand; and then, when a man makes a will, and afterwards does something by which it may be understood his

Vide 3 Wilson
511, 512.

intent is that the will should be changed ; this, in law, is a revocation. Thus, if a man devise his land to two, and, by another will, give it to one of them, and die, he to whom it is devised by the last will shall have it.

Ibid.

So, likewise, if a devisor by one will give lands to his son, and by another will devise the same to his wife ; the latter will revokes the former, and she shall have the land.

Year Book,
2 R. 3. fol. 3.

Again, where, in trespass, the defendant justified the taking of the goods by virtue of a will by which they were devised to him, and of which will he was made executor, and the plaintiff replied, that the testator made another will, and thereby did constitute *him* executor ; this was held a good replication, without a traverse that the defendant was executor ; because, by making of the second will, *which was contradictory to the first* inasmuch as he made another executor, the latter was, in law, revoked.

But, it has been determined that the mere circumstance of a *latter will's* existing, though expressly found by a jury, will not of itself be a foundation to decide it to be a revocation of a former will of land ; because the second will may be of things of another nature, as of goods ;

or

or it may be of different things of the same nature, as other parcels of lands ; or it may be a confirmation of the former ; it can never, therefore, be judged to be a revocation thereof until it be ascertained to be contradictory thereto.

Thus where, on a special verdict in ejectment, the jury found, that A. seised in fee of the lands in question, made his will, and, thereby, devised them in manner therein stated, and, after making that testament, viz. &c. he made *aliud testamen-tum in scriptis*, but what was the contents thereof, or its purport, or effect they did not know ; the question was, Whether the latter will, so found, was a revocation in law of the devise of lands in the former ? And the Court declared their opinion, that they were not satisfied the second will did revoke the former ; because it was not found that any lands were devised by the second will, so that it might or might not be consistent with the former ; and when the matter stood indifferent, the Court would not suppose a revocation of a will solemnly made. And this judgment was affirmed on appeal to the House of Lords.

Seymor et al. v.
Nosworthy in
scaccario Hard.
374 S.C. Show.
Par. Ca. 146.
S. C. by the
name of
Hitchins v.
Basset, in
Banco Regis,
3 Mod. Rep.
203. Comb. 90.
2 Salk. 592.
1 Show. 537.

And, though a latter will be expressly found to be different from a former, yet, if it be not known in what that difference consisted, it will
be

be no revocation in law thereof; because a will may be different from a former in giving of a ring or mourning, and yet may stand and be perfectly consistent with it. The revocation, therefore, not being a consequence of the mere act of making another will, nor the abstract effect of making a will different from another will, but of the repugnance of the subject matter of the latter with that of the former; it follows, that the contents thereof must be known to be inconsistent with the previous disposition, before it can be decided to be a revocation of a former will; that depending upon the evidence it furnishes of the change in the testator's mind; which can only be judged of by knowing what appears in both instruments,

Goodright v.
Harwood,
3 Wilf. 497.
2 Blackst. 937.
Cooper 87.
7 Brown Ca.
Parl. 344.

Therefore, where, on a special verdict in ejectment, the jury found that L. seised in fee of chambers, and having a considerable personal property, in 1748, by will, *duly attested to pass real property*, gave and devised all his real and personal estate of what nature or kind soever, or wheresoever, unto his dear friend H.; that, afterwards, in the year 1756, L. made and published another will and testament in writing, *in the presence of three subscribing witnesses, who duly attested the same*; that the disposition made by L. in the will of 1756, was different from the disposition

disposition in the will of the year 1748, but in what particulars was unknown to the jurors; but that they did not find that the testator cancelled his will of the year 1756, or that the defendant destroyed the same; but what was become of the said will, the jurors said they were altogether ignorant. The question was, Whether the latter will, being expressly found by the jury to be different from the former, was a revocation of it? Those who argued, that the last will, thus found, revoked the first, attempted to distinguish this case from that of *Hitchens and Basset*, upon the grounds that, in this case, the jury were so far from being totally ignorant of the contents of the second will, that they were enabled to find, and did find, that the disposition in 1756 was different from that in 1748; and they contended, that it concerned lands was sufficiently found by the mode of devising, and that it extended to the estate in question, was inferred from the testator's having no other estate which required the solemnities of the statute of frauds. But, on the other side it was contended, that, before a latter will could be determined to revoke a former, it must be shewn to contain an inconsistent disposition, or circumstances must be made out from whence that might be presumed, as spoliation, or the like; but here the jury expressly found, that they did not know in what the difference

rence consisted, though they found it different; that nothing could be presumed upon a special verdict; nothing specifically appeared touching the will in 1756; and the arguments for its being a revocation were fallacious; for it did not appear what were the contents thereof, *et de non apparentibus et non existentibus eadem est ratio*: that presumptions were always in the affirmative, there could not be any negative presumption; that no presumption could arise from a diversity, unless that diversity were shewn and found; that therefore a second *will*, in the dark, which neither the Jury nor the Court ever saw, and were *wholly ignorant* of the contents of, ought not to be set up; for, if it were, an heir might avail himself, by destroying the second will, to defeat both wills. And upon these grounds it was adjudged, in the Court of King's Bench, on writ of error from the Court of Common Pleas, that the latter will, so found, was not a revocation, and the judgment below reversed; and that reversal was afterwards affirmed in the House of Lords.

But it still seems questionable, whether the *precise facts* in which a latter will, so set up as a revocation of a former will, differs from it, must necessarily be found; for if the jury find *expressly*, that the disposition made by the second will,

will is *inconsistent* with the devises contained in the former, that appears to be a sufficient ground to decide the latter will a revocation; because evidence may be laid before them to prove an inconsistent disposition, or circumstances to lay a fair foundation for presuming it to be so, as spoliation or the like. Whether a revocation or not is sometimes a question of law, sometimes of fact, as where there are interlineations in a will. *Revocavit vel non* appears to be like *devisavit vel non*. All that seems necessary to be shewn on a special verdict of this kind is, that the jury have found the second will to be, in the particular in question, *repugnant to* or *inconsistent with* the first. In the principal case that was not done, the jury having, at the same time that they found the latter will different from the first, expressly declared, that they did not know *in what* the difference consisted; the inference from which seems to be, that the only reason they had to imagine it different from the first was, that another had been made.

A codicil likewise, if inconsistent with a preceding will, is, in law, a revocation of it.

Thus where M. by his will, gave particular lands, and his personal estate to be laid out in

lands, to charitable uses ; and then by a codicil, reciting his will, and that he had devised his lands to such uses ; " but that there had been an act " of parliament, intituled, " the mortmain act," " and being in doubt whether the devise made " by him to such charitable uses would be good " or not, and being still desirous, as far as in " him lies, to confirm his said will, nevertheless " if, by the act of parliament, or by any construc- " tion of law thereupon, the estate is not well " devised, and cannot go to those uses, then " and in such case, he gave the lands to B. and " his heirs." Afterwards M. made another co-
 dicil, reciting as before, and " that being advised " the devise of his lands would be void, and it " being his intention the charity should be con- " tinued, and being advised his personal estate " could be given, he did therefore, by this co-
 dicil, give his personal estate to the charitable " uses before mentioned, and he did thereby " give his real estate to B." Between the time
 of making the will and the codicils the mortmain
 act passed ; and the question was, Whether,
 upon the construction of all the instruments,
 the last codicil was a revocation of the first will ;
 which turned upon the point, whether the last
 codicil, as to its revoking the will, was put singly
 upon the point of law, whether the devise was
 valid or not under the mortmain act ; or whether

the testator, having been advised that his personal estate had been so much increased as to be sufficient to support the charity (for the codicil was made a considerable time after the will) taking the whole into his consideration, viz. the point of law upon the statute, viz. that the devise of the real estate would be void, the fact that he might make a good disposition of his personal estate to the uses of the charity, and that it would be sufficient for the purpose, meant an actual revocation of the will as to the real estate in all events. And, on a case sent from the Court of Chancery to the Court of King's Bench, they certified that the real estates were well devised to B. by the last codicil; the necessary conclusion from which is, that it was a revocation of the will.

But a codicil differs from a latter will, which, from the nature of the instrument, has been held a total revocation of a disposition varied therein from what it was in a former will, although no express clause of revocation be inserted therein; for, a codicil being considered both in our law. and in the civil law as part of a will, and taking effect together with it at the death of the testator, is, in its own nature, not intended to be a revocation of the instrument of the will, or of the particular dispositions therein; further than

as specifically altered thereby, *unless it contain words of express revocation.* A codicil, therefore, is no revocation even of the particular disposition in a preceding will to which it is applicable, except *precisely* in the degree expressed, leaving the particular disposition affected thereby, as well as the instrument, in all other respects, precisely in the state in which it finds them. This was one of the grounds on which Lord *Hardwicke* relied in support of his decree in the case of *Willet and Sanford*. There one made his will, devising the bulk of his real estate to three trustees on certain trusts, and some particular lands to charitable uses. He then made a codicil, which he published and declared should be annexed to and be taken as part of his will; and making some alterations thereby in the disposition of the trust of the bulk of his estate, *after reciting the devise to the charity*, he devised the same lands, together with another piece of land, to the same three trustees and two others, and their heirs, upon the same special trusts and confidences as in the will, and concluded with confirming *all other parts* of his former will. Upon these instruments it became a question, Whether this trust for the charity could take effect? The doubt arose from the circumstance of the mortmain act having passed in the time that intervened be-

*Willet v. San-
ford, 1 IVez.
178, 186.*

tween

tween the making the two instruments. If the codicil revoked the will as to the charity, it was clear that it could not take effect ; because the devise to it in the codicil, that being made after the act passed, was void. It was therefore contended by those who opposed the devise to the charity, that, by the codicil, the devise both as to the legal estate and trust was revoked ; for the whole fee, at law, was certainly altered, by the devise to five trustees instead of two. It passed to different persons in different manners ; the trustees must claim under the codicil ; an ejectment must have been brought in their five names ; they must have joined in any conveyance : the adding more land also shewed an intent to make a new regulation. But Lord *Hardwicke* was of opinion, that the beneficial interests and profits (that was the trust) to the charity, was not revoked but confirmed by the codicil ; and one ground of his Lordship's opinion was, from the nature of the instrument which effected a devise only in the degree expressed ; and, therefore, though the codicil effected a new devise of the legal estate by giving it to the same trustees and two others, and an alteration of the trust estate by a variation of the devise of the surplus profits, it left the trust for the charity exactly the same as under the will.

It seems that if a man, by a subsequent will or codicil, make a disposition different from a former one under a false impression, the impulse of which is the foundation of his will to change his former intent; such an act will be considered only as effecting a contingent presumptive revocation depending upon the existence or non-existence of that fact. As if one having previously devised to A. afterwards, by another will, without destroying the first, or by codicil, devised to B. stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before and had a husband living, neither of which facts were in the devisor's knowledge; such devise or codicil would not operate as a revocation of the former will, because it depends upon a contingency which fails. Again, suppose one devised land to A. and afterwards, by a codicil, reciting the former will, and that he was advised that A. was dead, gave the same land to B.—if A. were alive, B. could not take; because the codicil would not be a revocation of the will under such circumstances.

But care must be taken to distinguish between cases like the foregoing, where the testator acts under a *false* impression, originating from a *deceit*

test practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised upon him; for, although in cases of the first sort the devise will be void if the fact be otherwise than as the testator understands, yet, the law will be different in instances of the latter kind. Thus, if one having a niece who is married, and whose husband is living, having, subsequent to the marriage, devised his estate to his niece, afterwards make a will in these terms, viz. "It being doubtful whether, according to the rules of law or equity, I may devise my estate to the separate use of my niece, I therefore give and bequeath the same to my good friend B. and his heirs for ever;" it seems questionable whether, on such a disposition, a court (grounding its decision upon the principle, that *where the reason which a man gives for his devise is false, there his devise shall fail;*) would say, that, the law in the case put being now fixed and settled and not doubtful as stated by the testator, this devise should be void, and, consequently, not work a revocation of the former will, *though the latter was founded on that reason;* as such a doctrine might be carried to an extent which would render the effect of testamentary dispositions even still more uncertain and capricious than it is.

Supta 541-543.

Both the preceding cases may also be again distinguished from cases, where the testator puts the devise upon *a fact* in his own knowledge, and grounds his devise upon *that fact*, and not upon the *reality* of the fact which he conceives himself to know, whether that should come out in the event according to his conception or not: An instance of this kind may be found in the case of the *Attorney General and Lloyd*, in the second codicil; the words of which are, "that the testator being advised the devise of his lands would be void, and it being his intention the charity should be continued, and being advised his personal estate can be given, he does therefore, by this codicil, give his personal estate to the charitable uses before mentioned, and his real estate (which he had before given to the charity) to M." Now here the testator has put his disposition upon the fact of his being advised, and not on the soundness of the advice; for, his being advised was a fact in his own knowledge, and he grounds his devise which he then makes upon the fact of this advice, without reference to the reality of the law, though that should come out upon the event one way or another. In this case, and in cases of the like sort, the devise not being put upon the point of law, but upon the fact of the advice of the doubtfulness of the point of law, and depending upon

upon the latter fact, and being made in consequence thereof, will be good, let the point of law turn out which ever way it may; the devise will consequently work a presumed revocation of the former disposition to the charity.

But, where a latter will is the instrument by which a former is revoked, the revocation effected thereby is ambulatory until the death of the testator; for, although, by making a second, the testator intends to revoke the former, yet he may change his intention any time before his death, (until which neither of his wills can have operation;) and then the latter, being a revocable instrument itself, and only affecting the former as far as it is itself efficient, being revoked is as no will; the consequence of which is, that the first will, never having been cancelled, but remaining entire, stands in like manner as if no other had been made,

Thus where a testator made a will of his lands, and afterwards gave the same lands to the same person by a latter will but omitted to cancel the former, and afterwards cancelled the latter, and both wills were in the testator's custody at the time of his death, the second cancelled, the first uncancelled. The question was, Whether, under these circumstances, the first will

Goodright v.
Glazier,
4 Burr. 2512.
et vid. Perk.,
fol. 210. sec.
479. 44 A. S. Pl.
36. M. 44 E. 3,
33:

was to be considered as revoked, and the devisor consequently dead intestate? It was contended, on the behalf of the heir at law, that the second will was a complete instrument at the time when it was executed, and clearly proved the testator's intention of revoking the former; that the execution of it was as much a revocation of the former as if the former had been thrown by him into the fire; that the preservation of it was merely accidental and of no consequence; that having been totally extinguished it could never revive, it remained a mere nullity; that no subsequent event could hinder the execution of the second will from operating as a revocation of the former; that the second will therefore was the testator's only subsisting will so long as it remained uncancelled, and when he thought fit to cancel and destroy that, it became manifest, that he intended to die intestate, and that his heir at law should take. *Sed per Curiam*, a will is ambulatory till the death of the testator. If the testator let it stand till he die, it is his will; if he does not suffer it to do so, it is not his will. Here, though the testator made two wills, yet the second will never operated; for it was only intentional, and the testator changed his intention, and cancelled the second, so that it had no effect, it was as no will at all, being cancelled before his death; then the former,

mer, which was never cancelled, stood as his will; for none of the cases of revocations in law, by alteration of circumstances, applied to this sort of case, and it was clearly not a revocation within the meaning of the statute of frauds, Vid. Sec. 6. none of the circumstances delineated in that statute existing in this case.

But, if a prior will be made, and then a subsequent one *expressly revoking* the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again. So, if a testator having made a new will, *actually cancel* the former will by tearing off the name and seal, &c. and afterwards cancel the latter will, the former will is not revived thereby, although a counterpart thereof be found in his possession uncancelled and undefaced: because, in both the preceding cases, the revocation is an express, independant, substantive act, by which the former will becomes to all intents and purposes, void and incapable of taking any effect, unless as a new will by force of a republication.

Vide Cooper
53.

Vide Doug. 40.

Both the circumstances above alluded to occurred in the case of *Burtonshaw against Gilbert*, wherein a case was stated for the opinion of

Bintonshaw
v. Gilbert,
Cooper 49.

the Court of King's Bench on the following facts. N. in 1759, duly executed his last will and testament, and also a duplicate thereof, but at the same time declared that it was not a will to his liking, and that he should alter it. Afterwards, in 1761, he made another will, which was also duly executed, the devises in which were different from those in the will of 1759, and at the end of it there was a declaration, by which he revoked all former wills. After executing the latter will, N. took one part of the old will in his hands, tore off the name and seal, and directed the person who had made the new will to cut off the names of the witnesses to the old one, which he did in N.'s presence. N. at the same time said that a duplicate of the former will was in the hands of W. a devisee therein. He then delivered the new will to the person who made it, requesting him to take it away with him to his house, and keep it, for reasons which he mentioned. Afterwards a principal devisee in the last will died, soon after which the testator sent for the last will, and in 1762 had this will returned him. The testator, before his death, sent for an attorney to make a new will, but became senseless before he arrived. On his death, one part of the will of 1759, and also the will of 1761, were found together in a paper, both cancelled. The other part of the will of 1759 was found.

found uncancelled in the testator's room among other deeds and papers; how it came there did not appear; but W. a devisee therein, was in the house when the searches were made. And the question was, Whether the testator died intestate or not, that is, whether the will of 1759 was revoked? And it was held, that the will of 1759 was clearly revoked: First, by the new will of 1761, which was a complete, legal, and effectual will, and would have revoked the former whether it had been cancelled or not, because, at the end of it, there was a declaration, by which he revoked all former wills: secondly, because the testator had actually cancelled the will of 1759.

In the preceding case, it was attempted to set up the uncancelled part of the will of 1759, which was found among the testator's other deeds, as a new will; upon the ground that, in this case, there were circumstances equivalent to a new will; for, first, a favourite devisee under the will of 1761 having died, and by her death the testator's intentions under that will being defeated, he had cancelled it; secondly, that the testator had it in view to make a new will, and therefore there was the strongest evidence of his intention not to die intestate. But the Court held that the first will was, upon every principle of law, clearly revoked,

Ibid.

and

and could never be set up again but by a new will; and that these facts were not sufficient to show that this uncancelled part was intended as such; for, although it was among the testator's papers, it did not appear how it came there, with what view, upon what message, or under what circumstances. Whether the testator sent for it or not was totally in the dark: its being therefore in the possession of the testator, nobody knew how or why, furnished 'no colour for its being set up after the former was cancelled.

Secondly. By acts in *ipsis* amounting to a revocation in construction of law. Such a revocation may be effected in two ways; first, by a total alteration in the circumstances of the devisor; secondly, by an actual or intended alteration in the estate of the devisor.

First. No alteration in the circumstances of the devisor, except that of a marriage and having issue subsequent to the making his will has as yet been determined to be a revocation of a will previously made; but that has been considered as producing such a change in a man's situation, as furnishes a fair ground to presume, that there must have been a change in his mind, respecting the disposition of his property.

Thus,

Thus, in the case of *Brown and Thompson*, it was held by Sir John Trevor, Master of the Rolls, that a subsequent marriage and having children was a revocation of a will of land; and a bill filed by legatees claiming legacies charged on the estate by such will was dismissed.

Brown v. Thompson, heard at the Rolls, 1 Will, 304. in notes, 8th Dec. 1701, 1 Eq. Ca. Abr, 413, Pl. 15. vid. inf. 556. This decree reversed.

And, upon the same principle, it was decided in the Exchequer, upon a will, made by one in the life-time of a former wife who died without issue, whereupon he married a second wife by whom he had issue; that the testator's second marriage, *and having issue* by that marriage, was a total revocation of the will made in the life-time of the first wife.

Christopher v. Christopher, cited 4 Burr. 2182. in Scacario, July 1771.

The same question occurred in the case of *Spragge against Stone*. In this case there were two wills. The first will was made in *Jamaica* in 1764, by which the whole estate, real and personal, was devised to a stranger. The testator married in 1765, and had issue in 1766. Afterwards, on the 10th of October 1766, the testator made another will, which was in his own hand-writing, but not duly attested according to the statute of frauds, by which he devised his estate, real and personal, to his wife in trust for his son. It had been decreed in the Court of Chancery in *Jamaica*, that the marriage and

Spragge v. Stowe, at the Cockpit, 20 March 1773. cited Dougl. 35.

and birth of a child, and the second will, amounted to a revocation as to the personality, but not as to the real estate. But, on appeal to the Privy Council, (*Parker*, Chief Baron, *De Grey*, Chief Justice, and Sir *Eardly Wilmot*, being present) the decree as to the real estate was reversed, and it was declared that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the will of 1764. No notice was taken of the second will in the order of reversal.

This case is rendered somewhat the more strong by the circumstance of the testator's having made a second will, which, though ineffectual to pass lands, was certainly such an act as shewed the testator's intent to revoke his will by another will, and, thereby, rebutted the presumption that the will had been, in the consideration of the testator, revoked by the marriage and having children.

But, though the circumstance of the making another will was not sufficient to rebut the presumption, that the testator's intention with regard to his property was, by marriage and having a child, altered, yet, collateral circumstances have been considered as rebutting this conclusion. Upon this principle, the decree of Sir *John Trevor*, dismissing the bill in the before-mentioned

mentioned case of *Brown and Thompson*, was reversed by Lord Keeper *Wright*, and the legacies given by the will directed to be paid ; for, in that case, the testator had devised a legacy of 500*l.* to his brother, and other legacies to other persons, and his real estate he had given to E. C. and her heirs, which was the person with whom he afterwards intermarried, and whom, on his death, he left *privement enfeint* with a son ; and, therefore, although the Lord Keeper was clear of opinion, that an alteration of the testator's circumstances might be a revocation of a will of lands, yet, he thought the alteration of circumstances here was not sufficient for that purpose ; for no injury was done any person, and those whom the testator was bound to provide for were taken care of.

And this presumption, of a change of the testator's intent as to the disposition of his property, being an equity rising out of the particular circumstances of each case ; it may, like every other presumption, be rebutted by any kind of evidence, *parol* or written.

Thus where J. N. seised in fee, *inter alia*, of the estates in question, in June 1770, being a widower without children, and his sister A. being his heir at law, made his will in writing duly attested,

Brady v. Cubitt,
Dougl. 31.

tested, and thereby devised the same estates to trustees, to the intent that the Chancellor, Master, and Scholars of the University of Cambridge, and their successors, should receive an annuity therewith upon trust to be applied as directed in a book covered with marble paper, of his own handwriting, &c. by the will referred to; and subject to, and chargeable with the said annuity, and the powers and remedies for recovery thereof, in trust for his own right heirs and assigns for ever. *The will did not contain any devise of any other part of the testator's real estate.* After making this will the testator married, but, previous to the marriage and after making the will, he conveyed certain lands, of the annual value of 1230*l.* to trustees for the purpose of securing to his intended wife a clear yearly sum of 800*l.* in case there should be no son of the marriage, and 600*l.* if there should be a son, by way of jointure and in bar of dower, with remainder to himself in fee. The estates devised by the will were not comprised in this conveyance. The testator had issue of the said marriage one daughter. After her birth, he, continuing seised as aforesaid, subscribed his name to another paper-writing in the presence of three witnesses, who, at his request, subscribed their names thereto in his presence and in the presence of each other, the effect of which was as follows; viz. Memorandum of what J. N. said

said in the presence of A. B. and C. on the _____
day of _____ " That as his will was made before he
" married a second time, he had there devised his
" estate to his heir male;" and then after men-
tioning other circumstances it states, " that he
" also particularly devises, that the college gift
" may be paid and disposed as he has in the said
" will directed. The parchment book respect-
" ing the college gift is to stand. Mr. B.
" had instructions for this and drew it up." But,
before the signing of this paper by J. N. he
struck out this latter part of the memorandum
by drawing his pen across it, saying to the person
who reduced it into writing, " you may draw
" your pen through what you have now written, for
" there is a parchment book with the will in the
" bands of B. that mentions all about it." Soon
after this the testator died. And one question
was, Whether this will, and the devise therein to
the charity, was revoked by the subsequent mar-
riage and birth of a child? And it was held that
it was not; for, a subsequent marriage and birth
of a child affording a mere presumption, which
in this case, as in every other, might be rebutted
by every sort of evidence, the declaration of the
testator as to drawing the pen through the
latter part of the instrument last executed and
referring to his will as a subsisting instrument, was
decisive evidence to rebut the presumption that
the

the change of his circumstances furnished of an intent to revoke.

But it seems questionable whether, had the parol declaration respecting the will been wanting, the marriage and having a child would, under the circumstances of the preceding case, have furnished ground for presuming a revocation; for, there has as yet been no case in which the marriage and birth of a child has been held to raise an implied revocation, where there has not been a disposition of the *whole* estate. It was a total disposition in the cases of *Christopher* and *Christopher and Spragge and Stone*, and it always has been a total disposition in the cases of personal property; because by making an executor the whole is disposed of. In such cases the inference is exceedingly strong in favour of the wife and children, but it by no means follows that a like presumption is furnished when the disposition is only of a part of the testator's effects. Many reasons may be found why a man, though having a wife and child, should leave a considerable share of his fortune to go elsewhere. Suppose a man had given several legacies by his will and had devised all his real estate to the use of his children when he should have any, would his subsequent marriage and birth of a child furnish any ground to presume a change of his intent as to a disposition

Sopra 555.

so made; now in the preceding case the testator disposes of a small part of his estate to a charity, and then, in contemplation of his marriage he settles 800*l.* a year upon his intended wife, with remainder to himself in fee; it is clear therefore that he contemplated the change in his situation after the will made, and provided for it as to his wife, and it may be reasonably supposed that as to his children he meant to keep them in his power. There is sufficient undisposed of by the will amply to provide for them. What ground is there then to presume that he might not still entertain the intention of devising to the charity that part of his property given them, before marriage, by his will? There seems none, unless it can first be established as a clear proposition, that every man who marries and has a child must necessarily intend, that all he has in the world shall become theirs.

The decision in the case of *Shepherd* and *Shepberd*, though it arose on a will of personal property only, seems to furnish a strong ground in support of the foregoing observation; for the rules of presumed revocations are the same whether applied to dispositions of real or personal property; in both cases they equally turn upon the intent: and then the judgment on that case seems to lay the foundation for the principle,

O o

that

Shepherd verf.
Shepherd, vid.
Dougl. Rep.
38. Note (10).

that it must be a complete family disinherison by a will made before marriage that furnishes a ground for a presumed revocation by marriage. In that case, *Shepherd* the testator having made his will, after some small legacies to his collateral relations, constituted his wife residuary legatee. After the making of the will, viz. in 1673, his wife was brought to bed of a daughter upon whose birth the testator added a codicil whereby he directed that the legacies should be paid, and that an annuity of 300*l. per annum* should be secured on the *residuum* and paid to his daughter. The codicil and will were found together. In 1765 another daughter was born, and in 1768 a son, who was a posthumous child, the testator being dead about six months before his birth. And the question, on a case sent out of Chancery by Lord *Camden* for the opinion of Sir *George Hay*, was, Whether the subsequent birth of children was a revocation of this will? And it was determined that the subsequent birth of children, even in case of personality, did not amount to a revocation? Yet the case in *Cicero*, the principle of which has frequently been applied to instances occurring in our own courts, seems to warrant a contrary conclusion, if the case were of a father's dying and leaving all his fortune to a stranger, under the idea that he had no child, and then having a posthumous child born. The proposition is thus

Vide Winkfield
vers. Combe,
2 Ch. Ca. 16.

put by that great orator. *Pater credens filium suum esse mortuum, alterum instituit bæredem. Filio domi redeunte, bujus institutionis vis est nulla.*

Cic. de Oratore.

As to the effect of a woman's marriage on her will, made previous thereto, it seems questionable whether the circumstance of marriage alone amounts to a presumed revocation, but it is perfectly clear that it at least suspends the will during the coverture, so that if she die previous to the determination thereof by the death of her husband, her will is thereby countermanded; because the making of a will is but the inception of it, and it doth not take any effect until the death of the devisor; for *omne testamentum morte consummatum est, et voluntas est ambulatoria usque extremum vite exitum.* And then, as the law will not allow that a *feme covert* may make any devise, for the presumption that the law has that it will be made by constraint of the husband, so the law will not suffer the continuance thereof after marriage, for the presumption that the husband by constraint might cause her against her will to revoke or continue it. Therefore, as it would be against the nature of a will to be so absolute, that he who makes it, being of good and perfect memory, cannot countermand it; and as to permit a *feme covert* to revoke her will would be open to the objection of compulsion; the law, to avoid both

Vide Forse an d
Hembling,
4 Rep. 61. S.C
1 Anders. 181.
Gouldsb. 109.

inconveniences, considers the taking of a husband, being a woman's own act, to amount to a countermand in law, at least so long as the coverture continues.

But if the husband die, leaving the wife surviving, then the will, it seems, will revive and, on her death afterwards, take effect as if no marriage had intervened. Therefore if a *feme sole* make her will the first day of May and give land thereby, and, afterwards, the tenth day of May marry, and her husband die the twentieth of May, and afterwards the woman die the thirtieth of May, the devise, it is said, is good; because it does not take effect until her death, at which time she was discovered as she was at the time of making the will.

⁴ Rep. 6: a. b.
1 And. 181.
Goulds. 109.
et vid. Sackvill
v Ayleworth,
1 Vern. 105.

But, an alteration in the circumstances of the devisor as to his personal capacity, which renders him physically incapable of making or revoking a will, does not, in itself, amount to a revocation. As if a man of sound memory make his will, and afterwards, by the visitation of God, become of unsound memory; this act of God will not in law be a revocation of his will, which he made when he was of good and perfect memory. The reason for which seems to be, that in such circumstances a man cannot have any will, therefore from

from that time he must be considered as in the state of a non-entity as to the exercise of the powers of willing or revoking. Such a change of circumstances consequently furnishes no ground for a presumption one way or another.

Secondly. By an actual or intended alteration in the estate of the devisor.

First, by an actual alteration in the estate of the devisor.

On this part of our enquiry it is necessary to observe, that the principle which governs in cases of an actual alteration in the estate of the devisor, is clearly distinguishable from that which governs in cases of an intended alteration only; for in the former cases the revocation is a consequence of law uninfluenced by, and independent of, any intent in the devisor to revoke or not; but, in the latter cases, the revocation is an inference from the fact, as furnishing a ground to conclude that such was the intent of the party. It will be necessary for us therefore, if we wish to have a clear conception of this part of our subject, closely to attend to this distinction, as we shall find several nice and important consequences depending thereupon.

There is no feature in our law more prominent, than that of an uniform solicitude on

every occasion to favour the heir, and prevent his disinherison ; this anxious attention to the interest of the lawful representative has introduced into our law respecting devises this fixed principle, namely, that, as at the time of the inception of his will a man must be seised of the estate he devises, so the law requires that such estate should remain in the same plight, and unaltered, to the time of its consummation by his death ; and that his original intention in respect thereto should continue unremittingly the same until the object of it takes effect when the will is consummated thereby : and, therefore, not only any alteration or new modelling, which makes it a different estate, but also any intent of the owner to alter or new model the estate, will, in construction of law, render a disposition of it by will invalid. In this chapter we shall trace this principle in a variety of instances to which it has been applied, with all the subtlety and nice distinctions of artificial reasoning and technical disquisition.

First, then, as to an actual alteration in the estate devised.

Any alteration of the estate will, at law, operate as a revocation, whether it be made by act of the party ; by act of a stranger ; or by act of law.

First,

First, by act of the party.

It is almost unnecessary to observe that, in conformity to the first of these rules, any actual sale or disposition by a devisor of his real property to a third person, after making his will respecting it, will be a complete revocation.

This rule has not been confined to cases of alterations by an *actual* disposition to third persons, but has been extended to the case of an alteration in the legal estate, although in effect it leaves the testator, as to his beneficial interest in the thing, in the same plight in which he was before it took place.

The first instance of this kind that occurs in our books is in Mich. 44 E. III. which is the case of a man, seised in fee of land devisable by testament in an ancient borough, who made his will when he had two sons; but, they dying, he afterwards aliened the land in fee, and took back an estate in fee, and died without any new agreement to the will; and thereupon it was held that the will was void; for the alienation was a disaffection to it, and, therefore, without a new express agreement it could not be taken as his last will, because it had been once revoked.

¹ Rolle Abr.
616. Pl. 15.
44 E. III. 33.
Dyer 143.
Bro. Abr. Dev.
8 Fitzh. Abr.
285, 16. Et
vid. Frances's
case, 8 Rep.
90.

So if a man devise land to J. S. and afterwards make a feoffment in fee of it to a stranger

Dyer 143 a. b.
et ibid 74, 17.
et vid Pitt v.
Langford,
1 Show. Rep.
92, 93. S. C.
Rep. T. Holt
253.

to the use of himself in fee, although he has his old estate, yet this is a revocation; for his intent was to have it by the new limitation, and he by the feoffment passed an estate, and the statute vested it in him, *which is as a new purchase.*

1 Roll. Abr.
616. Q. 2.
Agreed per
Cur. in Mon-
tague and
Jeffries.

Again, if a man devise land to J. S. in fee, and afterwards make a feoffment *in fee* to another to the use of himself for life, the remainder to his wife for life, *the remainder to his own right heirs in fee*; although here he has his old reversion, yet it seems his intent was to have it pass by the livery, and to be in by the statute and the limitation, *and so as a new purchase*; and, for that reason, it seems this is a revocation of the will as to the fee, and not confined to the estate for life of the wife.

And the operation of the conveyance will be the same, if it be made by lease and release or bargain and sale.

Fitzwne v.
Fox, 1 Atk.
576.

Thus where B. in 1714, by lease and re-lease, conveyed certain estates in H. to himself for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to the right heirs of B. subject to a power of revocation by any deed or writing under his hand and seal, &c. so as that, at the time of such revocation, he settled other

other land in *Yorkshire* free from incumbrances to the same uses. B. afterwards made his will in 1729, and, thereby, among other things, devised *all* his lands in *Yorkshire* and elsewhere to trustees upon trusts therein mentioned. Then B. in 1730, by lease and release, intended by him as an execution of the power of revocation reserved in the former deeds, conveyed a *distinct* estate in *Yorkshire* to the uses of the former settlement in 1714, but this estate was deficient in value and subject to a term for securing children's fortunes, and, therefore, the settlement of it not a good execution of the power reserved in the former deed. But the lease and release, in 1730, being made subsequent to the will of 1729, was clearly held to be a revocation of the will *quoad* the devise of the *Yorkshire* estate, as part of all the testator's lands &c. in *Yorkshire* mentioned to be devised by the will; and that estate therefore was not subject to the trusts created thereby.

So where a man by his will gave his estate in fee to one of his sisters, and after this made a marriage settlement, wherein he limited the estate in strict settlement, remainder to his own right heirs; that settlement was held, notwithstanding the remainder was limited to his own right heirs, and so the old use, to be a revocation of the whole devise to the sister,

Martin v.
Savage, Bar-
nard 189. S. C.
cited 1 Vez.
440.

Again,

Bennet verf.
Wade, 2 Atk.
325.

Again, it was held by Lord *Hardwicke*, in the case of *Bennet* and *Wade*, that a recovery suffered of land after a will made, gave a new estate therein to the tenant to the *præcipe*, although the limitations were to the old uses; and, consequently, that a will thereof made previously was revoked by it.

Darley verf.
Darley, 3 Wils.
6. S. C.
7 Brown's Ca.
Par. 177.

So where A. being, under his marriage-settlement, tenant for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail, remainder to himself in fee, made his will, and thereby devised the settled estates as in his will mentioned; and then, by indenture of lease and release, conveyed the same hereditaments to B. his heirs and assigns for ever, and, afterwards, by another indenture, reciting the foregoing lease and release, and that the same was to make B. tenant to the *præcipe*, and for suffering a recovery, the uses whereof were therein declared, as to the lands in question, to be to himself and his heirs. Then a recovery was suffered, after which A. the testator died without republishing his will, and without there having been any issue of the marriage. The question was, Whether the deeds executed and the recovery suffered were, under the circumstances of this case, a revocation of the will? The counsel for the devisee argued that, in this case,

case, the deeds and recovery did not amount to a revocation, the same being executed and suffered by A. without any intention appearing upon the state of the case to alter or revoke his will; that a recovery by tenant for life remainder to trustees, &c. was a nullity, an innocent recovery, and in this case nugatory, that A.'s estate for life was not devisable; that all he could devise was his reversion or remainder in fee, and that thereof he could not suffer a recovery; that the recovery therefore only operated on his life estate, which amounted to nothing: But the Court of Common Pleas afterwards certified, that the deeds executed, and the recovery suffered, were a revocation of the will, but did not give their reasons for this decision. But the ground thereof seems to have been that, by the recovery, A. drew the whole interest in the land into himself, and got one intire fee, a total new estate in fee which could not be defeated but by the entry of the trustees to preserve contingent remainders; and that his former estate for life, with contingent remainders, &c. and remainder over in fee were all gone, until the trustees should enter for the forfeiture, which they never did: so that A. died seised of an estate in fee in possession of the lands comprised in the settlement, which was a *different* estate from that which he had when he made the will.

And

Vid. 2 Atk. 579.

And the rule is the same as to equitable estates, if any alteration be made therein by the testator's doing any act to alter the trusts thereof, or limiting it to new uses; for equitable estates are governed by the same rules that legal estates are.

Earl of Lincoln's
case Show. Ca.
Parl. 154. Eq.
Ca. Abr. 411.
2 Freem. 202.
cited by Lord
Hardw. as
law. 2 Atk.
579, 803. but
denied to be
law now, per
Lord Mansf.
Dougl. 722.
but said to be
law, and to be
observed in
like cases in
future, per
Lord Mansf.
4 Burr. 1961.

Thus where the Earl of *Lincoln*, seised in fee of certain manors and estates, devised the same to C. for life, remainder to his first and other sons in tail, remainder to such persons to whom the earldom might descend in tail male; and then sold part of these estates, and mortgaged the parts in question, and afterwards, upon a whim, in contemplation of a marriage, of which there was no serious intention, by deed of lease and release, conveyed his whole estate to trustees and their heirs till his then intended marriage should take effect, and, after such marriage had, then, as to part, in trust for his intended wife and her heirs and assigns for ever, and as to the rest in trust to permit the Earl to receive the profits during his life, and, after his decease, to sell the same for the best price, and apply the money in manner as therein was mentioned. No treaty had been entered into for this marriage at the time of the deed's being executed, nor no progress was made therein afterwards, but the Earl died unmarried and without any alteration of his will. And the question

question between the heirs of the Earl and those of the devisee was, Whether this lease and release were a revocation of the will? And it being admitted that they would have been so had the Earl had the legal estate, it was attempted to distinguish this case, upon the ground that he had but an equitable interest, the whole estate being before mortgaged in fee, and that, therefore, it ought to be considered according to equity. And that, in case of an equitable interest, a lease and release made no alteration of the estate so as to induce a necessity of adjudging it a revocation, as there was in case of a legal estate. That, as to the Earl's intention, it was plain that he did not intend to revoke or alter his will unless or until that marriage should take effect; for, by the release, the estate was limited to him and his heirs till the marriage, which was just as it was before, and the marriage having never taken effect the estate continued just as it was before. But the Lord Keeper was of opinion that the will was revoked by these instruments, and decreed accordingly, and that decree was affirmed on appeal to the House of Lords.

And the principle equally applies in the case of a resulting trust as in cases where the trust is limited, if the whole fee is affected by the conveyance.

Pollen verf.
Huband, 1 Eq.
Ca. Abr. 412,
12.

So where H. by will devised his real estate, of which he was *cestui que* trust, to P. on condition that he took the name of H. upon him and the heirs males of his body, with divers remainders over; and afterwards by lease and release H. together with his trustee, conveyed several manors and lands to trustees and their heirs, to the use of himself for life without impeachment of waste, and that the trustees and their heirs should execute such conveyance and conveyances thereof as H. by writing under his hand and seal, or by his last will and testament should direct or appoint. H. died without altering or revoking the will, or making any other appointment touching his real estate; and the question was, Whether this lease and release was a revocation of the will or not? And it was decreed that it was a revocation.

Parsons verf.
Freeman,
3 Wils. 308,
S. C. 3 Atk.
741.

Again, where, on articles before marriage, the wife, upon the husband's undertaking to do some acts for her benefit, covenanted that she would join with him in suffering a recovery of the estate in question, in which she had an estate tail, and would settle it to him and his heirs, and would settle other estates in which she had a fee on him for life. The husband, being thus intitled to the equitable fee, afterwards devised this estate; but he having omitted to perform the acts he had obliged him-

self to do by the articles, they came to a new agreement, that he should not take any part of the estate *instanter in fee*, but should take the whole, subject to an appointment of the husband and wife, and, in default of such appointment, to him and his heirs; thereupon a recovery was suffered by husband and wife, the uses of which were declared to be to the purposes of the new agreement; then the husband died in the lifetime of his wife, without having made any appointment with her. And the question was, Whether the recovery suffered by the husband and wife, and the uses of that recovery as declared by them, were a revocation of the will? And on the side of the devisee it was contended that here was no revocation, for the devisor had an equitable estate merely, viz. the trust of an estate in fee; and the operation of the recovery in law was, to convey the legal estate to the trust; that the recovery therefore was no ways inconsistent with, nor shewed any kind of intention to revoke the will as to this estate, and the conveyance of the legal fee was only a performance of part of the articles; that the recovery in this case created a fee in somebody, which, if no uses had been declared, would have been subject to such trusts as the tail before was subject to, and that if the legal estate thereupon would have resulted to the wife, it would have been in trust for the husband

N.B. In Wilson
it is stated that
the husband
survived.

husband under the articles, and in case of her death her heir would have been trustee for him. That therefore as the appointment was never made by the husband and wife, the recovery was no alteration of the *old equitable fee* the testator had in him at the time of making the will. But Lord *Hardwicke* was of opinion, that the recovery in this case effected a revocation; for it was plain, though there was no proof, they came to a new agreement, to wit, that she should be let in to join with him in an appointment, and he in consideration thereof was to have a fee in that estate wherein before he had only an estate for his life; and though it was said that, as to the particular estate in question, it was only turning an equitable into a legal estate, yet it ought to appear that this was singly the purpose; but here it appeared that it was also to vary his interest in the other lands, for the recovery and uses were to operate upon the whole fee of both. The testator, therefore, under the recovery, took a fee differently qualified, conveyed differently, and disposable differently from that which he was intitled to under the articles.

And where the thing disposed of lies in grant, a *will* made thereof will be revoked by a subsequent grant, if, thereby, the fee in it be affected.

Thus

Thus where A. in 1761, made his will, and thereby devised all his manors, messuages, tythes, tenements, and hereditaments whatsoever, in the county of *York*, or elsewhere in *England*, to trustees, their heirs and assigns, subject to the trusts therein mentioned, in trust for C. A. for life, remainder to his first and other sons in tail male, remainder to S. A. in like manner, remainder to T. H. in like manner, remainder to C. H. in like manner, remainder to S. H. in like manner, remainder in trust for his own right heirs for ever. Afterwards, in 1720, A. by a codicil revoked his will as to C. A. T. H. and C. H. In 1723, A. revoked the codicil so far as it affected C. A. but not otherwise. Then, in 1723, A. by indenture between himself on the one part, and the trustees in his will named on the other part, for the considerations therein mentioned, granted all the *advowson, donation, and right of patronage of*, in, and to the rectory of the parish-church of B. and all his estate, right, title, &c. in and to the same to the trustees, *to hold to them and their heirs, to the use and behoof of them, their heirs and assigns for ever,* and by another indenture, dated on the day following that on which the preceding instrument bore date, and made between the said parties, it was witnessed that the grant in the preceding deed was upon trust, that the trustees and the survivor

Sparrow v.
Hardcastle,
3 Atk. 799.

and his heirs should present to the said church, when vacant, such son of R. I. the then incumbent, as should, within five months from such vacancy, be by law qualified to be presented to the said church ; and in case there should then be two sons of the said R. I. who should be so qualified, then to present such of the said sons as the testator or his heirs should nominate ; and if at the time of such vacancy, there should be no son of R. I. so qualified, then to present such clerk as the testator or his heirs should appoint ; such clerk giving a bond to resign whenever a son of R. I. should become qualified ; provided that if there should be no son of R. I. then living, or a son who should neglect to qualify himself or refuse to accept the presentation, then the trustees to stand seised of the advowson, &c. in trust for the testator and his heirs, and on request *to convey the same* over to his or their use. And, in the same case, should present such clerk as the testator or his heirs should nominate ; and in default of such nomination, *then such* clerk should be presented as the said trustees should think meet. The testator, soon after these deeds were executed, died without issue ; and the question was, Whether the will and codicils were revoked as to the advowson, &c. by the subsequent instruments ? And it was held that they were ; for the legal estate was actually conveyed by

the grant, so likewise was the trust by the subsequent grant; for the profits of the accruer of the advowson were conveyed; and the clause at the end of the declaration of trust, viz. “*and in default of such nomination, then such clerk should be presented as the said trustees should think meet,*” was material to shew, that not only the whole legal estate, but the whole trust was parted with by the new declaration of the testator, as thereby a case was put in which the very trustees might have a right of nomination and presentation.

And although the conveyance whereby the estate is altered, be evidently made for a particular purpose, yet if the whole estate be affected thereby, it will be a revocation; as if a man devise Blackacre to J.S. in fee, and then, upon a marriage between him and A. covenant to make a feoffment of the said Blackacre and other land to the use of himself in fee, the remainder to his wife for life, the remainder in fee to his own right heirs, and afterwards make a feoffment accordingly; this, it is said by *Rolle*, will be a revocation; because the testator’s intent appears to be to have the land by the new limitation, which is a revocation of his will.

Again, suppose a man, feised in fee of an estate, devised it, and afterwards on a settlement,

Vide i Rolle Abr. 616. Pl. 4.
where it is said to have been determined otherwise in Montague and Jeffries’s case; but that decision denied by *Rolle* to be law. *Et vid. infra Hall v. Dunch; Ogle v. Cooke, et Vernon v. Jones, et note distinction.*

by lease and release, took an estate to himself for life, with a *limitation to a son when born* and the heirs of his body, without any trustees to preserve contingent remainders, it might be said, this was for a particular purpose, viz. to let in a son when born, and that it did not in the meantime make any alteration of the former estate; yet such conveyance has been clearly held to be a revocation of a will.

Any alteration in an estate devised, will operate as a revocation, even although the act done be necessary to give effect to the disposition made by such devise.

Dister v. Dister,
3 Lev. 108.
S.L. Marwood
v. Turner,
3 Will. 163.
new edit.

Thus, where tenant in tail made his will, and thereby devised land, and, afterwards, by bargain and sale inrolled, conveyed the same to a tenant to the *præcipe* against whom a common recovery was had, with voucher of the tenant in tail, to the use of himself in fee; the question was, Whether, by this recovery, the will was made good or revoked? And, on argument, the Court were unanimously of opinion, that the bargain and sale and recovery were a revocation of the will; because, thereby, all the estate was altered subsequent to its being made, and the estate taken back was an estate to the recoveror and his heirs, and not to the devisee.

So

So if a man covenant by indenture to levy a fine, and that it shall enure to the use of such persons as he shall name in his will, and, afterward, make his will, by which he devises his land to certain persons, and then he levy a fine in performance of his covenant; this will be a revocation of the will, although levied in performance of the covenant which was entered into before the will made; for the land could not pass by relation to the covenant made, but only to the time of the fine levied.

Lutwitch v.
Mitton,
1 Roll. Abr.
614. O. 3.

And if A. devise land and levy a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this it seems will be a revocation; because a fine operates as such from the return of the writ of covenant, and is a fine of that term in which that is made returnable; for the *concordia facta in curia* is the complete fine, the *concessit recordat* is merely the leave of the Court to enrol it. And yet this is a hard case, since by the caption the party conusor does all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

Vid. 3 P. Will.
170, note B. et
Lloyd v. Lord
Say and Seal,
Salk. 341.

And the rule of law will be the same, although the act be expressly declared to be done

with a view to give effect to the will, if, in its operation, the devisor be in as of a new purchase; for the rule being introduced with a view to preserving the inheritance in the heir at law, and not with a view to carry into execution the intent of the devisor, the question is not whether the devisor intended to revoke, but whether he intended to do that, the effect of which, in law, will be to alter the estate or interest which was in him, by passing it away and taking it back through a new channel; for, if that be his intention, whether he meant to revoke or not is immaterial: the mere intent to alter operating as a revocation in law, and not as a revocation by the party; and therefore taking effect without reference to the intent of the party as to the stability or non-stability of the will.

Vid. 2 Atk. 579.

Husley's case,
Moore 789.
Pl. 1 rego.
S. C. 1 Roll.
Abt. 614. O. 2.
Sed nota. In
this case the
revoked will
was held to be
sufficient to
declare the use
of the feoff-
ment, and pre-
vent the cf-
cheat.

Per L. Hardw.
3 Atk. 803,
804.

Thus where one, being a bastard, made his will, and thereby devised a manor, and, afterwards, he made a feoffment of the same manor to the use of such persons and for such estates as he had declared by his will, bearing date, &c. it was adjudged, that this feoffment was a revocation of the will.

And the Courts have still gone further and held, that if a man, seised in fee, thinking he had only an estate tail, suffered a recovery in order

order to confirm his will, yet this effected a revocation.

Although the act done by the testator, and which alters the estate before devised, be that very act which, at the time of making the will, the testator intended to be done, yet it will, in law, be a revocation of the will.

Thus where M. made her will, and thereby devised a messuage in L. to her sister for life, and after her decease to trustees to sell the same, and to apply 200*l.* part of the produce thereof to A. and other parts to other persons, and gave the residue to C. After the making the will, the testatrix sold the estate for 2,500*l.* part of which was left on mortgage of the estate, and the remainder laid out in the purchase of stock. Then the testatrix died without republishing the will ; and the question was, Whether this sale was a revocation of the will ? And it was held that it was, for there was an absolute disposition made by the will, and, before that could take effect, another absolute disposition inconsistent with it.

Arnold v.
Arnold,
Brown's Rep.
Ch. 401.

A *specific* devise of a lease for lives is revoked by a surrender and renewal thereof made subsequent to the will ; for, by the surrender of the old lease, the testator puts all out of him, and

divests himself, in consideration of law, of the whole interest, so that there being nothing left of the old lease for the devise to operate upon,

Vid. 1 P. Will. the will must fall to the ground.

575.

Alford v.

Alford, 2 Vero.

209. S. C. cited

2 P. Will. 168.

Hil. 1690.

The first case I find in which this point was agitated, was that of *Alford v. Alford*, where one devised a lease to his daughter, and afterwards renewed the lease by changing his life; but the testator having made a codicil to his will subsequent to the renewal, it became unnecessary in that case to determine this point.

Adean v.

Templar, at

Rolls, 15 June

1722.

The question was again agitated in the case of *Adean and Templar*; but there also it went off, an agreement being made between the parties to the suit.

Marwood and

Turner,

3 P. Will. 163.

But the point was at length decided in the case of *Marwood and Turner*. There Sir S. M. seised of an estate for three lives held of the Archbishop of York, made his will in 1711, and thereby, among other things, devised his leasehold estate to two trustees and their heirs, during the three lives; expressing an ardent desire, that the trustees would take care from time to time to renew the lease, and use their utmost endeavours to preserve the estate to the heirs male of the family, as long as the honour of baronetship should continue

tinue tberein. The testator, after making of the will, surrendered his lease for lives, and took a new lease of the Archbishop of York to him and his heirs for three lives, and put in a new life. Then Sir S. M. died. And the question was, Whether this surrender and renewal was a revocation? And it was insisted, on the part of those who contended that it was no revocation, that it would weigh with the Court, what ardent desire the testator had expressed in his will that his trustees, to whom this lease was devised, should use their utmost endeavours to continue the lease in the male line as long as there were any to inherit the honour; and that, as to the furrender of the old lease, this being only to take a better and more beneficial estate, was intended for the advantage of the devisee, to give him a larger and more extensive interest than he had before, and to increase the bounty that was designed him; that the renewal of the lease was only a grafting upon the old stock, and a continuation of the same estate, with some little addition to it; that if this renewal of the lease was a revocation in law, yet it would not be so in equity, but the renewed lease would be subject to a trust for the devisee, and that there was the stronger reason for this construction, in that the testator by his will had directed that the trustees renewal of the lease should be a

means

means made use of to continue and preserve the estate in the family. But the Court held, that by the surrender and renewal, the lease was gone, and the will consequently void.

And the rule of law is the same as to terms for years renewable on fines, &c. A renewal of them will likewise operate as a revocation of a will *expressly* disposing of *such lease*; and the operation of law will be the same, although the claim of the devisee, from circumstances, be maintainable only in a court of equity.

Abney v. Miller,
2 Atk. 593.

* Vid. next
case, the will
there stated to
have been his
estate in his
college leases.

Thus, where B. possessed of two college leases, made his will, and thereby gave and devised all his college leases * *which he THEN held* of *Magdalen College* to his mother, to be by her sold, and the money arising by sale to be applied as therein mentioned. The mother died in the life of the testator. Some years after making the will, B. surrendered one of the leases, and accepted a new lease of the said lands, sealed with the college seal, and paid a large sum of money by way of fine. Then the testator died without having republished, or in anywise altered his will; it being admitted that, in equity, the death of the mother did not affect the right of the *cestui que trusts*, so far as she was barely a trustee, but that remained the same as if the trustee

trustee had been living; one question was, Whether the renewal of this lease by the testator, after making his will, was, in law, a revocation of it? And it was held that it was; for, this was not a devise of the land, but a devise of *the lease* which the testator held of *Magdalen College*; so that it was the same as if the testator had devised a term, and that term had been surrendered and gone. Here was an utter annihilation of the old term and a purchase of a new one. Where a testator expressed himself in the present tense, it must relate to what was in being at the time of making the will. If this had been an immediate bequest, it would have been a revocation in law, so would it be in equity; for the rule as to revocations is the same in equity as at law.

Vid. *Mason v. Day, Pre. Ch.*
319. this lease
is a new pur-
chase or ac-
quisition, and
though coming
from the mo-
ther, will go to
the heirs of the
father after re-
newal.

And although the devise of a term be expressed in words describing the thing in which the interest for term of years is, and not descriptive of the interest therein; it will nevertheless be revoked by a surrender and renewal afterwards; because the devise of the thing must be referred to the interest which the devisor had in the thing at the time of the devise, and cannot be referred to an interest therein, not subsisting at that period.

Thus,

Thus, where a testatrix devised all her lands, tenements, and hereditaments at W. in *Yorkshire*, and all her tythes and ecclesiastical dues out of W. aforesaid, or any other town or places near the same. At the time of making the will, she was possessed of a lease of these tythes under the Archbishop of *York*. After making the will she surrendered this lease, and took a new one, of which she was possessed at the time of her death. The question was, Whether the renewal was a revocation of the will? It was attempted to distinguish this from the preceding case, upon the ground that, in the preceding case, the will mentioned all his (the testator's) estate, &c. whereas here it was only described, 'All his tythes at W. *Sed per Curiam*, there is no real distinction between the words *All my tythes at W.* and the words *All my lease or interest in my lease at W.*; because both must refer to the interest she had at the time of making the will. Then that interest did not remain at the death of the testatrix; for, by the surrender, she so far altered her interest, that what were her tythes under the lease at making the will, could not be considered, under the foot of this clause, as being the same at the time of her death; but she acquired a new estate in them, to commence at and run out to a different period of time. It must then be considered, that the testatrix acquired a new interest
subsequent

subsequent to the will, and, consequently, such an interest as would not pass by the words used.

Again, where S. by his will, among other devises, gave and devised unto B. *the perpetual advowson and disposal of the living or rectory of W. for ever, together with the tythes of all sorts thereof.* The rectory of W. was held by the testator by lease from New College, Oxford, for the term of ten years. After the will made, the testator surrendered up that lease, and took a new lease from the college for ten years more, and was possessed of the rectory, by virtue of that lease, at the time of his decease. And the question was, Whether the devise of the advowson was revoked by the surrender and renewal? And it was held that the surrender and renewal were a revocation.

Hone v. Med-craft, Brown. Ch. Ca. 261.

It is necessary here to observe, on these cases of revocations of wills respecting leases by subsequent surrender and renewal of the lease, that they turn merely on the penning of the will, viz. whether the words are sufficient to pass the subsequent renewed interest, and not on any inability in point of law to give by will an after-taken lease; and therefore if such lease be disposed of by will by a proper form of words, it will pass notwithstanding any subsequent

Vid. Bunter
and Cooke,
Salk. 237.
1 P. Will. 575.

2 Atk. 599:
3 Atk. 177.

quent renewal. As if a testator give "all his
"estate, right, and interest, he shall have to
"come in such lease at the time of his death :"
so such right of renewal will pass by a general
devise of the residue ; or by a devise of the lease
together with a right of renewal. And in the
latter case, if the devisor do nothing, the expi-
ration of the old term will not bar the devisee ;
because the devise carries the right of renewal
as well as the lease itself.

Sterling v.
Lydiard,
3 Atk. 199.

Upon this principle Lord *Hardwicke* held, in
the case of *Sterling v. Lydiard*, that where the
testator clearly meant to dispose of his whole
personal estate, a renewal of a lease, after the
will made, was no revocation of it. In the case
alluded to, the testator devised in the following
manner, viz. "As to all and singular my lease-
"hold estate, goods, chattels, and personal estate
"whatsoever, I give the same to my daughter
"A." and if she died without issue living, then
he limited it over in the same manner to B. In
the residuary clause the testator repeated the
words "all and singular, &c." After making
this will, he renewed a lease with the *Dean and*
Chapter of Windsor. And on the question, Whe-
ther this renewal was a revocation of the will
as to the lease ? Lord *Hardwicke* said, there was
no doubt but the leasehold estate passed by the
will.

will. The lease here was not a specific legacy. It was nothing like it. The clause was only an enumeration of the several particulars of the testator's personal estate, but the devise was general of the whole.

So where C. in right of a prebendary, in 1714, demised certain estates by indenture to one of his children, for twenty-one years, and afterwards a surrender was yearly made thereof and a new lease granted by C. The lessee always executed a declaration of trust declaring, that his or her name was made use of in such lease, in trust for the father for so many years as he should live of the term, and then for such person or persons as he should by deed or will appoint; and in default thereof, to and among his children equally. In January 1735, C. made his will, and, after giving several legacies, bequeathed to his son T. *all the rest of his goods, chattels, and estate, whether real or personal, in possession and reversion,* and made him executor. And then came this supplemental clause; "Item, " It is my mind and will, that T. shall have the " disposal of the lease of my prebend of " made to my daughter S. and that he should " receive to himself all the *profits and advantages* arising from it." Afterwards, in August 1739, a surrender and new lease was made to S.

Carte v. Carte,
3 Atk. 174.

and

and a declaration of trust delivered as before-mentioned. Then C. died; and Lord *Hard-wicke*, upon that part of the case which related to the operation and extent of the words in the will, said that the question was, Whether the benefit of the renewed lease in 1739 passed to T. by the will of 1735? which depended upon the question, Whether the will of 1735 was sufficient to pass not only the trust of the lease then in being, but also the benefit of the subsequent renewals? And he took the construction of this clause in as extensive a manner, as if the testator had particularly recited and repeated the lease and declaration of trust, and given it to his son; the effect of which would have been to have given him the whole trust, not the trust of the then existing term only, but also all the renewals; and therefore extended to all future leases as well as those in being. The word *advantages* was undoubtedly sufficient to take in all the advantages and benefits belonging to the trust. It comprised not only the profits but the renewals, which were consequential. The words of the will were very sufficient to pass not only the trust and beneficial interest then subsisting, but also the renewed lease.

In cases of this nature, if the renewed lease be not complete at the death of the testator, the previous

previous disposition will not be affected by the surrender; and, therefore, it was held by Lord Hardwicke, in the before-mentioned case of *Abney and Miller*, as to one of the leases disposed of, that, although the devisor had surrendered and accepted of a new lease, yet, as it had not been sealed with the college seal until after the testator's death, the will, *as to that*, remained valid.

² A.R. 593.
Supra 586;

And where the revocation depends upon the *exclusive fact* that the estate devised is altered, independant of any intention of the testator one way or the other, the nature of the interest in, or of the thing devised, must be actually and substantially changed; for, if that be not the case, there will be no revocation in law.

Therefore it was formerly held, that, if a man, seised in fee of land, devised it to his brother, and afterwards covenanted with B. upon a marriage with the sister of B. to make a feoffment in fee of the same land and of other land also, which feoffment should be to the use of himself for life, the remainder to B.'s sister for life for her jointure, such covenant was no revocation of the will; because possibly it might never be performed.

Montague
v. Jeffries,
1 Roll. Abr.
615. 3. et vid.
1 Blackst. 349.

But since courts of equity have considered articles for the sale of estates, or respecting the settlement

tlement of them, as of the nature of actual conveyances from the time at which they are agreed to be carried into execution; covenants, when the covenantee has a right to a specific performance, have been allowed, in equity, to operate as revocations of wills previously made.

Rider v. Wager
a P. Will 329

Thus, where A. devised to his wife six houses in *London*, in the possession of —— in bar of dower, and, subject to his legacies, devised to his elder daughter one moiety of his real estate, and to his younger daughter the other moiety. Afterwards the testator's eldest daughter married, and, previous thereto, he, by articles, covenanted to settle one moiety of all his real estate to the use of himself for life, remainder to his eldest daughter and her husband for their lives, remainder to their younger children in tail general, remainder to himself in fee. The question was, Whether these articles were a revocation of the will as to a moiety? And it was held that they were; for, though this was but a covenant, and therefore, at law, no revocation of the will by which the testator had disposed of his real estate, yet the same, being for a valuable consideration, was, in equity, *tantamount* to a conveyance, and, consequently, in equity, a revocation of the will as to a moiety of the six houses devised by the testator.

So,

So, where A. and his wife surrendered copyhold lands to the use of the wife for life, and, afterwards, to such uses as she, by any writing, or by her last will, attested by three witnesses, should appoint. The wife accordingly, by a writing purporting to be her last will, and signed by her in the presence of three witnesses, gave, devised, limited, and appointed the same to her daughter in tail, remainder over in fee. Afterwards the wife, surviving her husband, did, upon a marriage agreed to be had between her and C. by deed or writing attested by two witnesses only, covenant to surrender the lands to the use of her intended husband and herself and his heirs. The question was, Whether these articles revoked the will? *Ex per Curiam*, though a covenant or articles do not, at law, revoke a will, yet, if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof.

It has been held, upon the principle that *no actual* alteration is made in the thing devised, that the changing of trustees, where the estate originally devised is only the trust, will not amount to a revocation in law. Thus, where A. made his will, and devised that his feoffees

Cotter v. Layer,
2 P. Will. 624.

in trust should make a lease to C. and D. for eighty years, at a certain rent payable to his executors; and, being afterwards resolved to change the feoffees in trust, caused them, or some of them, to join with him in a feoffment of the devised hereditaments to new trustees and their heirs, to the use of A. and others, until A. limited or ordered new uses thereof, which he never did. It was held that the feoffment was, *in equity*, no revocation of the will.

Fullerton v.
Watts, cited
Dougl. 691.
Canc. T.
14 Geo. III.

So where W. by his will devised all his real estate in *Berkshire* to certain trustees and their heirs, to the use of his first and second sons, &c. successively in strict settlement, with remainder to his own right heirs; and, afterwards, made a codicil to this will, by which, after reciting that since the publication thereof he had contracted for the purchase of certain lands, he directed the trustees and executors in his will to pay the purchase money out of the *residuum* of his personal estate; and that, on payment thereof, the said purchased lands should be conveyed, settled and limited to the same uses and on the same trusts, as, by his will, he had limited and declared concerning his other estates. Afterwards the testator himself completed the purchase referred to in the codicil, and took a conveyance of the purchased estates to certain trustees,

†

therein :

therein named, in fee, in trust for himself and his heirs, soon after which he died. And the question was, Whether the conveyance of the new purchased lands to the trustees, subsequent to the will and codicil, was not, as to those lands, a revocation? And it was decreed that this was no revocation; for, before the purchase completed the vendor was but a trustee for the purchaser, and the completion of the purchase was but taking the estate home.

Again where G. seised of manors and freehold lands in fee, by indenture mortgaged the same in fee; afterwards G., on the marriage of his son, conveyed these estates to trustees, in trust to secure an annuity on his son and his intended wife for and during the joint lives of himself and his son, and subject thereto, to himself for life, remainder over, the ultimate remainder to himself in fee. Then G. made his will, by which he devised the reversion in fee of part of these lands to trustees in fee upon certain trusts and to certain uses not material to be stated, and devised the reversion in fee of the other part to the same trustees and their heirs in trust to sell and dispose thereof, and, with the money arising from the sale, to pay and discharge all principle and interest due on any mortgages or other incumbrances affecting these estates, and, from and after payment thereof,

Doe, lessee of
Gibbons, vers.
Pott, et al.
Dougl. 710.

to apply the residue of such purchase monies in paying and discharging the fortunes therein before given to his younger children. Then the mortgagee, in consideration of the mortgage money paid in, conveyed the mortgaged estates comprised in the marriage - settlement to the trustees by lease and release to the uses and trusts therein limited, freed and discharged from all equity, terms, provisoed, and conditions of redemption. Afterwards, by lease and release, reciting the above facts, the same estates, comprised in the marriage-settlement, were conveyed by the trustees to a trustee in trust for G. in fee. Then G. died without having done any other act to revoke or alter his will. And one question was, Whether these instruments amounted in law to a revocation? And it was contended that they did; for, at the time of the will, the legal estate was in the mortgagee, and, after the will, was transferred from her and conveyed to a trustee; and, though the equitable interest might have remained the same after the conveyance to the trustee, yet, there having been an alteration of the legal estate after the will, that, it was said, would operate as a revocation; *Sed per Curiam*, unanimously, G. at the time of the devise, had merely the equitable fee in him, the mortgagee was his trustee. Then, on payment of the mortgage money, she conveyed the legal estate in fee to the trustee,

trustee, which was merely transferring it from one trustee to another; and there had been no determination or case in which the change of a trustee had been held to revoke a will. Therefore the Court thought the will was not revoked.

And Lord *Hardwicke*, in the case of *Parsons* and *Freeman*, laid it down as a general proposition, "That where a man had an equitable interest in fee in an estate and devised it, and afterwards took, by a legal conveyance, the legal estate therein to the same uses, this was no revocation;" for this was the common case where a man contracted for the purchase of lands, and, before any legal conveyance thereof made to him, devised the same and died; in such case the devisee might compel a specific performance, and should have sufficient of the testator's personal estate to pay the purchase money; and, though the devise were between the articles and the legal conveyance, the latter was no revocation; for, of what kind soever it might be, it was only *instrumental* in changing an equitable into a legal estate, and made no alteration in the will.

But his Lordship, at the same time, observed, that it could not be laid down as a general rule, that the turning of a legal estate into an equitable one

Parsons verf.
Freeman, 1
Wilson 311, et
vid. 3 P. Will.
170, et Green-
hill v. Green-
hill, 2 Vern.
679. Et vid.
1 Roll. Abr.
616. 3. et Dyer
73, 10.

would not be a revocation; because if a man, seised in fee, devised, and, afterwards, conveyed his estate in trust for himself, this certainly would be a revocation.

Where several instruments taken together operate as one conveyance of land, a devise made thereof, in the intermediate space between the execution of the first instrument and the completion of the last, will be valid; *because all the parts of such a conveyance will be considered as constituting one whole by reference to its inception.*

Selwyn v. S.
Selwyn,
1 Blackst.
Rep. 251. S.C.
2 Burr. 1131.

Thus, where by deed, in 1750, S. was made tenant for life, remainder to his son in tail, and, in 1751, the father and son joined in a bargain and sale to W. and his heirs, to make him a tenant to the præcipe in order to suffer a common recovery, the uses of which were declared to be to S. the father for life, remainder to the son in fee-simple. Trinity term began the 7th of June 1751. On the 8th of June the son made a will, whereby he disposed of all his real estate. In the same term a writ of entry was sued out returnable Quinden. Trin. viz. 16th of June, and the recovery was completed the same term. Soon afterwards the testator died. And a doubt arising as to the validity of the will, a case was sent out of Chancery for the opinion of the Court of King's Bench,

Bench, and the question was, Whether the lands in dispute passed by this will made after the bargain and sale and after the beginning of the term, but before the return of the writ of entry? And the court of King's Bench certified that the will was valid. The foundation of which opinion seems to have been, that the Court considered the whole transaction as one conveyance, each part whereof must relate to the date of the bargain and sale, which was the principal part, and which was perfected, made absolute, and delivered from objections, by the subsequent ceremonies.

So explained by
Lord Mansf.
4 Burr. 1962.
Et S. C.
1 Blackst. Rep.
706.

So where, in 1724, a copyhold estate was surrendered to the uses of a marriage-settlement, which left, in the surrenderor, the reversion in fee, and a power to devise the same by will; afterwards a surrender was made by him to the use of his will and a will made accordingly. Then, in 1751, the surrenderor was called upon by the steward to be admitted to some of the particular estates created by the original surrender in 1724, which was done. And the question was, Whether this admittance operated as a revocation of the prior will? And the Court held that it did not; because the whole transaction might be considered as one and the same, and then the admittance in 1751 would relate to the surrender in 1724, and be prior to the will.

Roe on the dem.
of Noden verf.
Griffiths,
1 Blackst.
Rep. 605. S. C.
4 Bur. 1952.

Riley verf.
Bartinglas, Sir
T. Raym. 240.

A partition between tenants in common, if confined to that object merely, is no revocation. Thus where A. and two others were tenants in common of the manor of B. in the county of W. in fee; A. made his will in writing of his third part, and, afterwards, by indenture and fine, partition was made betwixt the tenants in common. And the question was, Whether this was a revocation of the will? And it seemed to all the Barons, viz. *Montague, Littleton, Thurland, and Bertie*, that it was not any revocation.

Luther verf.
Kidley, 3 P.W.
170. note B.
Sed vid.
3 Keb. 357.
Pl. 48. et S. C.
1 Sid. 90. cont.
but a republi-
cation pre-
sumed.

So where A. and B. being tenants in common of lands in fee, A. by will, in January 1719, devised his moiety in fee, and afterwards, in 1722, A. and B. made partition by deed and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee. The case was by Lord Chancellor King sent to the Judges of the King's Bench to give their opinion, Whether this was a revocation of the will? And they certified unanimously, that they were all of opinion that the will of A. was not revoked by the deed and the fine levied in pursuance thereof, and that A.'s share of the lands, contained in the deed and the fine levied thereon, passed by his will. And in this opinion the Chancellor concurred.

But,

But, if the conveyance, by which a partition is made, be for any other purpose except merely that of partition, it will operate as a revocation of a will previously made.

Thus, where T. died in 1741, seised in fee of lands being gavelkind, leaving two sons R. and H. who both entered therein upon their father's death, and were each seised of an undivided moiety thereof; and, they being so seised, R. made his will, and devised all his land and tenements and all his moiety to his wife. Afterwards a deed of partition was made and executed by and between R. and H. and the lands in question were allotted to R. and it was covenanted therein that they and their wives should all join in levying a fine (which was done) and that the same, as to the lands in question, should enure to the use of R. and such person and persons, and for such estate and estates, as he should, by deed or will, limit, direct, or appoint, and, in default of such appointment, to the use of R. in fee. Lord Chief Justice *Lee* held this to be clearly a revocation of the will, and not like the case of a *bare* partition only unattended by a fine or conveyance to a new use, which would not have been a revocation.

A surrender of a copyhold to new uses, with remainder to the surrenderor in fee, will
be

Titner v. T.
Titner, cited
1 Wils. 309.
et 3 Atk. 74,
745, 750.

be no revocation of a will under a surrender previously made.

Thruston on the
dem. of Gower
vers. Cunningham,
Blackst.
Rep. 1846.

Thus where S. in 1733 surrendered copyhold tenements to the use of T. and B. his wife, for their lives, remainder to the heirs and assigns of T. and they were accordingly admitted; and then T. surrendered to the use of his will. B. died, leaving issue by T.—G. the eldest, and I. the youngest son. In 1744, T. the father surrendered these tenements to the intent that the Lord should regrant them to the use of T. and his heirs until his marriage with S. and then to the use of T. and S. for their respective lives, remainder to the heirs of their two bodies, *remainder to the right heirs of T.* No admission was had by T. under this surrender. Afterwards, viz. in 1757, T. devised the estates to S. his wife for life, remainder to I. his youngest son, and M. his wife for their respective lives, and died leaving S. his widow, and G. his eldest son and heir. In 1759, S. was admitted for her life on the former surrender made on her marriage, and then G. the son was admitted to the reversion expectant on her decease. I. the youngest son died; then S. the tenant for life died. Afterwards M. the widow of I. was admitted by virtue of the will of T. and the surrender to the use thereof. The question was, Whether, by the subsequent acts, the surrender

render to the use of the will was at an end? It was argued that, by the surrender in 1744, every thing passed out of T. the devisor, consequently there was an end of the surrender to the use of his will in 1733; and, he never having been admitted, nor of course surrendered to the use of his will, in consequence of the new limitation in 1744, nothing passed by the will of 1757. *Sed per Curiam*, unanimously, the old use in fee granted to T. in 1733, to which he was then admitted, and which was surrendered to the use of his will, was not taken out of him by the new limitation and surrender of 1744. He had therefore no occasion to be re-admitted to it for the purpose of surrendering to the use of his will, but shall be construed to be in of his old estate.

Secondly. By an intended alteration of the estate of the devisor.

Under this head those cases may properly be arranged where the devisor, after the making his will, attempts a disposition of his estate, and intends a complete conveyance, but fails therein, either for want of due formalities in the form of the instrument that he uses, or from an incapacity to take, in the person to whom he means to convey.

Moore 429. Ca.
599. S. C.
Poph. 108.
¹ Roll. Abr.
615, 4. et vid.
² Atk. 72, 73,
803. 1 Blackst.
349.

An instance of the first kind occurred in the case of *Montague* and *Jeffries*; there A. seised in fee of the manor of *Marifield* and of *Grovelands* expectant on a lease for years, made his will, by which he devised the manor and *Grovelands* to B.—then A. covenanted with R. to make a feoffment to the use of himself and C. the daughter of R. whom he intended to marry, which feoffment was accordingly made by letter of attorney, and livery was executed in the manor of *Marifield*, but not in *Grovelands*. A. then married C. and afterwards died. The question was, Whether the feoffment without livery was a revocation of the will as to *Grovelands*? And the Court were of opinion that it was. The reason for which seems to have been that, *prima facie*, it imported an intention to alter the former disposition.

¹ Roll. Abr.
615. Pl. 5. per
Popham and
Gawdy.

So if a man, seised of a reversion expectant on an estate for life, devise it to J. S. and, afterwards, by deed, grant the reversion in fee to J. D. although the lessee for life never attorn, yet this works a revocation; inasmuch as the devisor has plainly shewn his intent that J. D. shall have it.

I' id. 615. Pl. 6.
agreed per
Popham et
Gawdy, et ¹
Vez. 178, 180.

Again, if a man devise lands to J. S. and, afterwards, bargain and sell them to J. D. and acknowledge the bargain and sale in order that it may

may be inrolled according to the statute; although it be not inrolled within the six months, yet it shall be a revocation of the will for the reason before mentioned.

And, at common law, if a man had devised land by his will in writing; and had afterwards devised it to another by parol; although the latter devise was void as a will, yet it was a revocation of the first will.

1 Roll. Abr.
615. Pl. 7. per
Popham.

But in these cases of imperfect conveyances, (they differing from those of actual alterations of the estate devised, inasmuch as the former rest intirely upon a change of the intent to dispose by will, inferred from the attempt to convey in another manner than in the will is effected, whereas the latter turn upon the fact of the alteration only and are governed by that without any reference to the intent) it may be shewn, that the devisor had no intent to alter the disposition he has made, and, if that case be made out in proof, no revocation will ensue from the circumstance of there having been such imperfect conveyance.

Upon this ground *Wingfield's* case, in which it was held, that a feoffment without livery was not a revocation of a will previously made of the same land, may be reconciled to the before-mentioned

Wingfield's
case, Gouldsb.
32. Pl. 7. S. C.
Godb. 132. Pl.
152. Owen 76.

mentioned case of *Montague and Jeffries*. In the former case, A. devised land in N. to W. and his heirs in fee, and, afterwards, made a deed of feoffment thereof to divers persons unto the use of himself for life without impeachment of waste, the remainder unto the devisee in fee. But, before he sealed the deed of feoffment, he asked if it would be any prejudice to his will, and he was answered, No. Then the devisor asked again if it would be any prejudice, *because he conceived that he should not live until livery was made*. And it was answered, No. Then he said that he would seal it, for his intent was that his will should stand; and he sealed it, and a letter of attorney to make livery. Afterwards livery was executed on part of the land, and then the devisor died. And, whether that part of the land whereof livery had *not* been made passed by the will, or whether the devise of it was revoked by the feoffment *without* livery was the question. And it was insisted that it was a revocation; for, if the devisor had said this should not be his will, that had been a plain revocation, and, then, the making of the feoffment was as much as to say, that the will should not stand. But it was answered by the Court, that it appeared that the mind of the testator was, that his will should stand, and, if there was *no feoffment*, there was no revocation *in law*, and then there was no revocation

tion in deed ; for the devisor said, *if this will not bunt my will I will seal it*: and, although the attorney made livery in part so that the feoffment was perfect in part, yet for the lands in question, whereof no livery was made, the will should stand ; for a will might be effectual for part and part might be revoked; and the Court told the Jury that this was their opinion, and they found accordingly.

Instances of the second kind; namely, instances, where the conveyance, made after the will, fails from an incapacity to take, in the person to whom the later disposition is made, are likewise not unfrequent in the books. As if a man devise land to one, and, afterwards, by another will, devise it to the poor of such a parish, the latter devise is void, because the devisees have not a capacity to take; yet this is a revocation. So if the latter devise were to a corporation, a devise to whom is not within the statute, that likewise would be a revocation.

Again, if one devise lands to A. and, afterwards, by another will, devise the same lands to B. who is a papist; both devises are void : for though the last is void as a will, yet it is good as a revocation.

¹ Roll. Abr.
⁶, 4, 4, 5.

Roper vers.
Constable,
² Eq. Ca. Abr.
359. Pl. 9 Vin.
Abr. tit. Dev.
R. 3, in margin
of Ca. 2.
1 Brow. Par.
Ca. 450. 9 Mod.
190. 10 Mod.
237.

R r

And,

And, upon the same principle, a subsequent grant to a person incapable of taking is a revocation of a will previously made.

Beard verf.
Beard, 3 Atk.
72.

Thus, where A. being at variance with his wife, by his will, made in 1739, and executed at a tavern, gave all his estate real and personal to his brother, and made him executor. And in 1740, A. by a deed poll, gave and granted to his wife *all his substance* which he then had or might thereafter have. The question was, Whether this will was revoked by the deed poll? *Es per* Lord Chancellor, the latter instrument cannot take effect as a grant or deed of gift to the wife; because the law will not permit a man to make a grant or conveyance to his wife in his life-time, neither will a court of equity suffer the wife to have the whole of the husband's estate while he is living; for, it is not in the nature of a provision, which is all the wife is intitled to. But, then, another consideration remains, viz. though it cannot take effect as a grant to the wife, yet, whether it be not an act so inconsistent and repugnant to the will, that it may, though an act not strictly legal, amount to a revocation? And his Lordship said, that he was of opinion it was, and declared that the will was revoked as to all the *personal estate* by the deed poll.

Nota. The deed poll only extended to personal estate.

Secondly.

Secondly. By the act of a stranger.

As to revocations by an alteration in the estate made by the act of a stranger. These being effected by act of law merely, it is immaterial whether the intent of the devisor be to revoke or not.

Thus it was held * in the King's Bench by *Yelverton* and *Mark*, that, if a man devise his lands and afterwards be disseised and *die* before entry, the devise is thereby revoked, notwithstanding there is no such intent in the devisor; because the disseisin turns it to a right, and it is then only a chose in action; and, therefore, it is a good plea against a devise, that the devisor did not die seized of the lands devised.

But it seems † if the devisor re-enter the devise will not be affected by the temporary disseisin; because by re-entry the propriety is revested in the disseisee and the disseisin purged; for the regress of the disseisee has relation, as to the property, to continue the freehold in him *ab initio*.

And if a father ‡ devise land to his youngest son, and the eldest son, knowing thereof, enter into the land and disseise the father by which the will is void. Yet, because it was made void by deceit and covin, it will be made good in Chancery.

* Vid. Year Book
Mich. 39 Hen.
VI. 18. b. Pl.
23. 1 Roll. Abr.
616. S. 1. et
same law, Ca.
T. Holt. 748.
Nota, It is ob-
serveable upon
this doctrine
that a will may
be rendered
void by a secret
transaction in-
tirely un-
known to the
devisor. Ex gr.
Suppose a man
grant a lease
at will, and
the lessee make
an under lease
for years, and
the underlessee
enter and make
a secret feoff-
ment. In this
case, if the lessor
make or
have made his
will, it seems
it will be re-
voked by the
disseisin.

† Vid. 11 Rep.
51. a. b. Ca. T.
Holt 748. de-
nied by Dod-
ridge, Palm.
205. unless a
new publica-
tion. Supra
184—186.

‡ 1 Roll. Abr.
378. 1 Eq. Ca.
Abr. 174. 1.

Haines verf.
Haines, 2 Vern.
441.

But a stranger cannot by cancelling or tearing revoke a will. Therefore where an uncle having devised his real estate to distant relations, and disinherited his nephew and heir at law, and a younger brother of the heir at the funeral snatched the will out of the hands of the executor and tore it in many small pieces, and most of the pieces, particularly those wherein the devise of the land was, were picked up and joined together again; it was decreed, on a bill to have the will established, that the devisees should hold and enjoy against the heir and that he should convey, although no direct proof was made that the heir directed the tearing of the will.

Thirdly. By mere operation of law, without any act of the party.

In this case also, as well as in the preceding one, a revocation may be made notwithstanding no such intent is in the deviser. This question was agitated in *Trevilian's case*. There *ceftui que* use of lands made his will in the 23d Hen. VIII. thereby devising the same to his wife for life, remainder over; the trustees continued their estate to these uses until the 27 Hen. VIII. when the statute for transferring uses into possession passed, by force of which the deviser himself became seised in his demesne as of fee, and, being so seised, afterwards, in the 36 Hen. VIII. died:

the

Trevilian's case,
Dyer 142 a. 143
b. S.C. 1 Roll.
Abr. 616. R.
2. et vid.
Gouldsb. 150.
Sed vid. ibid
616. Q. 3.
which seems
contra, but the
case Dyer 73,
10. which is
referred to, is
not adjudged.

the wife entered ; and the question was, Whether the will was good, or whether the statute 27 Hen. VIII. was a revocation of it. And it was contended that the will was revoked ; for in 23 Hen. VIII. when he who made the will was seised in use, the will was warranted by the common law by reason of the confidence and trust; but before the will took effect the statute of 27 Hen. VIII. destroyed all wills of land, so that, after that statute, none could be seised in use so that he might declare his will ; and, by the proviso in that statute, all wills made and consummated by the death of the makers, or which should take execution and effect by death before a certain day in the same year, or the next year, were affirmed and made good *and no others*: and, then, this will was clearly void until the statute of 32 Hen. VIII. which gave authority to make wills of soccage lands, and was understood to extend only to wills made after that statute. Therefore by this will, if warranted by that statute, the land ought to pass to the devisee, and *that* it could not have done if it had taken effect at first when it was made and therefore it could not afterwards. And of that opinion was *Stamford*, Justice, but *Brooke*, Chief Justice, doubted whether the statute was a repeal and revocation or not, but he argued that it was not ; and *Brown*, Justice, was with him in opinion. But judgment was deferred and afterwards given for the revocation.

Thompson v.
Roebottom,
22 July, 20
Geo. II. cited
2 Vez. 419.

So a devise of annuities which were afterwards subscribed by act of parliament, was held to be revoked thereby.

Winkfield's
case, Goldsb.
32. Godb. 132.
Owen 76.

A will may be revoked either absolutely or conditionally, in all or in part, and if it be revoked only in part the rest will stand.

We have already considered what acts amount to absolute and entire revocations in law, or in equity; therefore it will only be necessary here to take notice of conditional or in part revocations, properly denominated Revocations *pro tanto*.

Vid. 1 Roll.
Abr. 617. Z. 3.
Dyer 143 b. in
note.

The most striking instance of a conditional or in part revocation seems to be that of a mortgage in fee, which, at law, appears to have been, as well before, as after forfeiture of the condition, an absolute revocation of a will previously made, being an alteration of the estate. And though courts of equity now consider a mortgage only as a conditional revocation *pro tanto*, depending upon the mortgage being discharged or not, yet they seem not to have viewed it in that light until after their jurisdiction was fully established; for, in the case of *Thomas and North*, which arose on a devise of lands of which a mortgage was subsequently made for a sum to be paid in three years,

Thomas vers.
North, 17 Car.
2. 1 Ch. Rep.
82.

years, the Court refused to relieve the devisee, and dismissed his bill against the heir at law, who had redeemed, entered on, and disposed of the lands ; he insisting that, if there was a will, yet that will was revoked by the mortgage made subsequent, and that it had not been shewn that the will had afterwards been republished.

But, when the nature of a mortgage came to be better understood, and courts of equity had established an *exclusive jurisdiction* over that species of property, they held, that, though, in law, a mortgage in fee was an implicit revocation of the whole estate, yet, in equity, the intent of the party in making it ought to be considered, which was only to supply himself with money for his occasions, and not with design to revoke the devise in his will. They, therefore, considered the conveyance as made for a particular purpose, and as a pledge for money only, and, though it was of a real estate, yet, in consideration of equity, the thing conveyed was looked upon merely as a personal interest ; for it had, in equity, no quality of a *real* estate, and, therefore was, in equity, no revocation of a *real* estate, the testator being considered *there* as having only created a chattel interest.

This point is held to have been settled in the case of *Hall* vers. *Dunch*. There J. S. devised

Yorke verf.
Stone, 1 Salk.
158. et vid.
3 Atk. 748,
805. Lord
Bridgewater v.
Duke of Bol-
ton, 2 L.Raym.
968, Perkins
v. Walker,
1 Vern. 97.

the lands in question to A. in tail male remain-
der to B. in fee, and, having afterwards occasion
for money, mortgaged the same in fee, and then
died: after which, A. being dead without issue,
B. brought his bill against the heir at law to be
let into the benefit of the devise. It was insisted,
on behalf of the heir, that the mortgage, being in
fee, was an *absolute* revocation of the devise *in
equity*, as it clearly was at law. But the Master
of the Rolls was of opinion that a mortgage in fee
was a revocation *pro tanto* only, and decreed ac-
cordingly: and on an appeal to Lord Chancellor
Jeffries the decree was affirmed.

Rider v. Wager.
Supra 594, 2 P.
Will. 329.

And though a mortgage be made by deed and
fine, yet it will be only a conditional revocation
pro tanto. This was so decided in the before-
mentioned case of *Rider* and *Wager*, one fact in
which was, that the testator and his wife had, after
his will made, mortgaged the estate by lease and
release and fine for 3000*l.* which was contended
to be an absolute revocation of the will. But the
Lord Chancellor said, that it could only be a
revocation *pro tanto*.

Per Cowper,
Cha. 8 Vin.
Abr. 136. Pl.
10.

But, if a man devise lands, and afterwards
mortgage the same for years, and then levy a fine
sur conusance de droit come ceo, &c. and not a *fine*
sur concessit, this will be a revocation; but, if it
had

had been a fine *sur concessit*, it had revoked only *pro tanto*. *Sed quare?*

A conveyance by way of mortgage for years is in law, as well as in equity, only a conditional revocation *pro tanto* of a devise in fee; but still the construction is different in law and in equity; for, in law, the mortgage is an *absolute* revocation *quo ad the term*, though the reversion passes by the will notwithstanding; but, in equity, it is a revocation *pro tanto* only as well with respect to the term as to the reversion, and the reversion *there* draws to it the equity of redemption.

Thus, where one devised a term for ninety-nine years carved out of an inheritance, in trust to pay 14*l. per annum* to the testator's granddaughter for life, and, after making the will, the devisor mortgaged this land for *five hundred years*, it was held per Lord *Cowper*, Chancellor, that the mortgage was a revocation *pro tanto* only of the devise of the annuity in equity, and that the daughter must keep down the interest or pay a third part of the mortgage money on redemption.

*Saunders v.
Hawkins,
3 Vin. Abr.,
156. Pl. 2.*

But, whether a mortgage for a term of years was a revocation *pro toto* or *pro tanto*, seems to have been formerly a question of fact resting upon *quo animo* it was made; for, in the case of

Barber

*Barber v. Took,
1 Cha. Ca. 193.*

Quære of the
term, for clear-
ly not so of the
reversion?

Barber and Took, where the testator, after having devised his lands in fee, mortgaged them for years; the Judge, though he was of opinion that the mortgage was only a revocation *pro tanto*, on the counsel for the heirs at law insisting that it was an actual revocation of the whole will, directed it to be tried, Whether there was an actual and total revocation?

But, a distinction has been made where the mortgage is to the devisee and where it is to a stranger; for, if it be made to the devisee, it is an absolute revocation of a will previously made; because the mortgage is inconsistent with the devise: for a man can never have been intended to be mortgagor and mortgagee at the same time.

Harkness v.
Bayley, Pre.
Ch. 514.

Thus where B. seised in fee, having had four daughters, three of whom were dead, made her will, and thereby devised lands to her daughter and her heirs, and, afterwards, for securing 4000*l.* to the daughter (wherein she stood indebted to her for her own and her three sisters legacies under their father's will, and wherewith those lands were chargeable in the mother's hands) and interest, the mother mortgaged these lands to the daughter for five hundred years, with proviso to be void on payment of 100*l.* *per annum* during the mother's

ther's life, and the 4000*l.*, and interest within three months after her death. The question was, Whether this mortgage for five hundred years to the daughter was an absolute revocation of the devise thereof in fee to her by her mother's will, or only a revocation *pro tanto*? And it was decreed to be an absolute revocation of the devise in fee, it being made to the same person as, and therefore inconsistent with, the devise.

Upon the principle, that the conveyance is intended for the particular purpose of *a security*, and, therefore, in its nature only *personal*, courts of equity have held that, where, after a will, the whole estate devised has been *differently* disposed of for the purpose of paying a debt, and, consequently, with a view to a security merely, it shall be a revocation only for that particular purpose, namely, to let in the incumbrancer; because, in such case, the testator himself has drawn the line how far the revocation shall go, and his intention is plainly shewn.

Thus where a real estate was devised, and, afterwards the devisor, in order to pay a debt due to C. conveyed the same to him in fee to be sold for that express purpose, and, in trust for the testator as to the residue, this was held to be a revocation *pro tanto* only *in equity*.

Ogle v. Cooke,
cited 2 Atk.
272.

Vernon v.ers.
Jones, Pre. Ch.
32.2 Vern. 241.
1 Eq. Ca Abr.
410, 10.
2 Freem. 117.

So where V. being married and seised of rever-
sionary estates after a term of years in mort-
gage, made his will, and devised all his lands, ex-
cept his capital messuage, &c. to trustees upon
trust to sell, to pay certain debts, and, afterwards,
to raise 200*l.* *per annum* rent charge out of the
excepted lands for his wife for life for her jointure
provided she released her dower, and also to raise
certain portions for his daughters, and a mainte-
nance of 100*l.* *per annum* for his eldest son. And
then V. mortgaged his estate for a further sum,
and the wife joined in a fine; and afterwards V.
made a deed of trust, whereby he conveyed all his
lands to several persons (who were sureties for
some of his debts) in trust to sell all or any part
for payment of his debts, and that, afterwards the
surplus should be to him and his heirs, and then
died without republication of his will. The ques-
tion was, Whether the mortgage, fine, and deed
of trust revoked the will? And it was contended
that these instruments and assurances were with-
out doubt a revocation in law of the will; for,
whereas by the will he had subjected his lands,
with exception of some particulars, to be sold
for payment of debts, and made those excepted
lands a fund to raise 200*l.* *per annum* for the
wife's fortune, now, by the subsequent deed of
trust, he had subjected those excepted lands as
well as the rest to be sold for the purposes in
that

that deed, and so had destroyed the fund upon which the 200*l.* was, by his will, to be raised for his wife, and had declared the *surplus of all*, after debts paid and his trustees indemnified, to be to himself and his heirs; and, to obviate any objection that might be made, upon the ground that the wife's having a right of dower might be a consideration for the 200*l.* *per annum* given by the will, and so she a kind of purchaser, it was said, that there was a mortgage upon the whole estate before the marriage, and so the wife's title of dower was of no consideration at all, or, if it were, that she had barred herself thereof by joining in the fine upon the second mortgage. But the Court, consisting of three commissioners of the great seal, were unanimously of opinion, that neither the mortgage and fine; nor the deed of trust, were a total revocation of the will, it being made for particular purposes; but that, after debts paid, the widow should have her 200*l.* *per annum*, and the younger children their portions, if the estate were sufficient to pay all, and, if not, should be paid in proportion.

And where J. S. devised all his real and personal estate to trustees, their heirs, executors, and administrators, in trust to pay 15*l.* *per annum* to his sisters for their lives, and, after several legacies, devised the surplus in trust for dissenting ministers, particularly,

Lloyd et ux v.
Spillet, et al
3 P. Will. 244
S. C 2 Eq. Cl
Abr. 776. 25.
2 Atk. 143.

particularly, 35*l.* *per annum* to the dissenting minister at *Reading*, and gave 300*l.* a piece to the trustees, and 20*l.* *per annum* while they executed the trust. Afterwards, by lease and release of subsequent date to the will, as well for and in consideration of the natural love and affection which J. S. bore to his cousins A. and B. and his friend C. as in consideration of 10*s.* paid by them, the testator conveyed all his real estate unto and to the use of the said A. B. and C. their heirs and assigns for ever, with a proviso to be void on payment of 10*s.*; and, by another deed of the same date, and on the like consideration, the testator gave all his personal estate to the said A. B. and C. proviso to be also void on payment of 10*s.*; and it was agreed that J. S. was to have the rents and profits during his life, for the maintenance of himself and family. J. S. kept both these deeds in his custody, and soon afterwards died. The trustees for some time paid the annuities, but they afterwards refused to pay either the annuitants or the ministers, and took the property to their own use; and then it became a question between the heirs at law of J. S. and the trustees, Whether the deed of conveyance of the real estate, and the deed of gift of the personal estate, had revoked the will, the consequence of which, the former contended, would be, that the conveyance being voluntary and without

out consideration, and A. B. and C. intended to take only as trustees, a trust resulted to the heirs at law. But Lord Chancellor *Talbot* was of opinion, that the will was not revoked by these instruments ; for they were not intended to prejudice the charity, but to strengthen it. And he said, it was a further argument of the intention of the testator, that the trustees should not have the estates to their own use, inasmuch as, after the deed of the lands and goods were executed, still they were kept in his own custody. So that, as the deeds were only intended by way of trust in the trustees, it was more reasonable to establish the trust on the foot of the will ; and this decree was affirmed on a rehearing before Lord *Hardwicke*, he being of opinion, that here was a sufficient consideration, and that the legal estate and beneficial interest did likewise well pass to A. B. and C. and that there was in this case no resulting trust to the heirs at law, nor any intention in J. S. that the trust should result, his design being to secure the charity at all events.

Revocations *pro tanto* may operate, either by altering the quality of the estate in abridging the interest in, or diminishing the quantity of, the thing devised.

Vid. Sir Richard
Pexhall's case,
1 Roll. Abr.
617. X. 1.

A man may alter the quality of the estate in the thing devised, by turning that which is conditional into an absolute estate. As if a man command another to write his will, and thereby to give his wife an estate for life in his manor of D. and he writes, that the testator gives it her for her life *upon condition that she shall not marry*, and this condition being shewn to the devisor he disallows it; yet by this the estate is not revoked, but only the condition.

So if a man devise an estate upon condition, and, afterwards, on reflection, strike out the condition.

Montague v.
Jeffries, 1 Roll.
Abr. 616. U.2.

Upon the same principle, if a man abridge the quantity of interest that he has disposed of by his will; as if he, by any subsequent disposition, vary his will as to part of the estate he has previously given, *leaving his disposition as to the remainder of it unaltered*, this will operate as a revocation *pro tanto*. As if, after a devise in fee, the devisor lease to a stranger for life; this is no revocation of the fee, but only during the estate for life, because the devisor's intent does not appear to revoke but during that estate.

Per Lord
Mansfield,
Cooper 90.

So if a testator devise an absolute estate in fee to A. and, afterwards, by a subsequent devise, give him only an estate tail in the same land; it is a revocation

revocation to the extent of the difference between an estate tail and an estate in fee.

Again, where T. had two sons, F. and W. by several venters, and devised lands to the use of F. his eldest son for life and to the heirs males of his body, and for default of such issue *to the use of the heirs males* of T. and the heirs males of their bodies, remainder to the use of his own right heirs, and then made a lease of thirty years to W. his youngest son, to commence after the death of the testator. W. entered and surrendered the term to F. who entered and assigned the remainder of the term to the defendant, and then died without issue. And one question was, Whether this lease made to the youngest brother, being to commence at the same time at which the devise to the eldest brother was to take effect, operated as a revocation of the whole devise, or only *quo ad* the term? And, as to that point, the Court resolved unanimously, that it was not a revocation of the inheritance, but *quo ad the term only*; for, both dispositions might stand together, and there could be no revocation unless it were expressed that the intent of the testator was changed, or that the dispositions could not stand together.

Hodgkinson v.
Whond, Cro.
Car. 23.

But, although a lease, when made to a stranger to the devisee, is a revocation *pro tanto* only,
 S f yet

yet it is held that, if it be made to the devisee himself, to commence from the death of the devisor, it is a total revocation; because the estates cannot stand together, and, consequently, by making the latter the testator must have intended that the former should not stand.

Coke v. Bullock,
Cro. Ja. 49.

Thus, where C. devised his lands to his sister in fee, and, afterwards, let the same land by indenture to his sister for sixty years, to commence after his death. The question was, Whether the making this lease was a revocation of the will? And it was held that, *being made to the devisee*, it was a revocation *in toto*, and not *pro tanto* only.

Ibid.

The testator having, in the preceding case, delivered the deed to a stranger, to the use of his sister, which stranger did not deliver it to the sister till after the death of the devisor; it was argued, that the devisor intended that she should have an election to have the fee or the term, and, therefore, that, as she never agreed to the lease, but claimed by the devise, she had a right to take under the latter: *sed non allocatur.*

Ibid.

But it was agreed, in the same case, unanimously, that if the lease made to the devisee had been to begin presently, or *futu**rely in the devisor's life-time*, that had not been

any revocation of the will ; for the lease might then have determined in the life-time of the devisor, and therefore have well stood with his will.

Revocations *pro tanto*, operating by alteration of the quantity both of the estate and subject, might, at common law, have been effected by the testator's declaring, that part of the thing devised should not go to the devisee ; and may now be effected by his disposing of any part of the hereditaments devised to different purposes from those in the will. Thus if a man had devised three manors to J. S. and afterwards declared, that the devisee should not have the manor of D. which was one of the three ; this would not have been any revocation as to the other two.

¹Roll. Abr. 617.
Y. 1.

And where B. having issue four daughters, devised his messuage called N. and the park and lands thereto adjoining to trustees, in trust to permit his daughter S. to receive the rents and profits until her marriage or death, and, in case she married with the consent of two of the trustees and her mother, then to convey the same to her and her heirs, but if she died before marriage, or married without such consent, then to convey to other persons. Afterwards S. married in the life-time of her father, and with his consent,

Clarke et ux v.
Berkeley, et, •
cont. 2 Vern.
720. S.C. 1 Eq.
Ca. Abr. 412.
13. 2 Eq. Ca.
Abr. 771. 12.
Et vid. Goulds.
32, 33.

yet it is held that, if it be made to the devisee himself, to commence from the death of the devisor, it is a total revocation; because the estates cannot stand together, and, consequently, by making the latter the testator must have intended that the former should not stand.

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But it was agreed, in the same case, unanimously, that if the lease made to the devisee had been to begin presently, or *futu**rely in the devisor's life-time*, that had not been

any revocation of the will ; for the lease might then have determined in the life-time of the devisor, and therefore have well stood with his will.

Revocations *pro tanto*, operating by alteration of the quantity both of the estate and subject, might, at common law, have been effected by the testator's declaring, that part of the thing devised should not go to the devisee ; and may now be effected by his disposing of any part of the hereditaments devised to different purposes from those in the will. Thus if a man had devised three manors to J. S. and afterwards declared, that the devisee should not have the manor of D. which was one of the three ; this would not have been any revocation as to the other two.

¹Roll. Abr. 617.
Y. 1.

And where B. having issue four daughters, devised his messuage called N. and the park and lands thereto adjoining to trustees, in trust to permit his daughter S. to receive the rents and profits until her marriage or death, and, in case she married with the consent of two of the trustees and her mother, then to convey the same to her and her heirs, but if she died before marriage, or married without such consent, then to convey to other persons. Afterwards S. married in the life-time of her father, and with his consent,

Clarke et ux v.
Berkeley, et, cont. 2 Vern.
720. S.C. 1 Eq.
Ca. Abr. 412.
13. 2 Eq. Ca.
Abr. 771. 12.
Et vid. Goulds.
32, 33.

and, thereupon, he settled part of the lands he had before devised to her upon her and her husband, and then he died. And it was held, that this settlement was no revocation, as to the devise of the remainder of the lands which were not settled.

Brudenell v.
Boughton,
2 Atk. 268.
Supra 19. 49. 59.

Again, where B. by will duly executed pursuant to the statute of frauds, and dated in October 1738, gave and devised 800*l.* to his sister E. and also 400*l.* to his sister L. and other small pecuniary legacies, and then gave all his real and personal estate, not otherwise therein disposed of, after payment of his debts and legacies, to S. his brother, and appointed him executor. Afterwards B. by a subsequent will, dated May 1741, and revoking all former wills, gave and bequeathed 100*l.* to his sister L. and 400*l.* to his sister E. and the rest and residue of his estate, real and personal, he disposed of as before. But the latter will was not executed according to the statute of frauds. Lord Hardwicke being of opinion, that these legacies being to be taken originally as personal, because although the latter words created a charge upon the land, yet they were in their primary intention personal; the next question was, Whether the legacies given by the first will were revoked by the second *in toto*, they being given differently and

to

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to different persons ; or, whether the legacies given by the second will were to be considered as only modifications of the first, and, consequently, as revocations of them *pro tanto* only ; the consequence of which would be, that the latter legacies would continue a charge upon the land ? And Lord Hardwicke was of opinion, that the legacies given by the second will were to be considered as part of the money given by the first, only new-modelled or qualified ; and that the second will, therefore, was a revocation of the first *pro tanto* only ; and, accordingly, decreed the raising the lesser sums out of the real estate of the testator,

Having endeavoured to explain the principles, the nature, and extent of revocations at common law, we shall now consider how far they have been altered, added to, or abridged by the clause respecting revocations contained in the statute of frauds,

By that statute it is enacted, " that no de-
 " vice in writing, of lands, tenements, or here-
 " ditaments, nor any clause thereof, shall be re-
 " vocable, otherwise than by some other will
 " or codicil in writing, or other writing declaring
 " the same, or by burning, cancelling, tearing,
 " or obliterating the same by the testator him-

29 Car. II.
cap. 3. sect. 6.

" self, or in his presence, and by his directions
 " and consent; but all devises and bequests of
 " lands and tenements shall remain and continue
 " in force, until the same be burnt, cancelled,
 " torn, or obliterated by the testator or his di-
 " rections in manner aforesaid, or unless the
 " same be altered by some *other* will or codicil
 " in writing, or other writing of the devisor
 " signed *in the presence of three* or more witnesses,
 " declaring the same, any former law or usage to
 " the contrary notwithstanding."

Per Lord
Hardw.
2 Atk. 272.

Upon this clause it has been held, that it extends not only to devises of lands, but also to those of a sum of money charged by will upon lands; they must both be revoked in the same manner.

Cartwright 81.

Upon the construction of this clause in the statute, it has also been held, that it leaves virtual revocations, *i. e.* revocations by conclusion and operation of law, in the state in which it finds them; they being founded upon maxims of law built upon conclusions from a physical necessity, the principal of which are, that *cessante causa, cessat effectus, et sublato fundo tollitur id quod fundi potest*. These therefore were not affected by the statute, but remain as they were before,

Revocations under the statute may be effected in three ways; first, by some *other* will or codicil in writing, or other writing declaring the same; secondly, by an act done to the instrument or will itself, an outward visible sign or symbol of revocation, which signs may be of four kinds, and are specified by the legislature, viz. burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent; thirdly, by some writing which is required to be executed in a form different from a disposing will, as it is required to be signed *in the presence* of three or more witnesses declaring the same.

In pointing out the two first of these ways, the statute seems to have been declaratory only of the common law, being descriptive of acts which, previous to the making of this statute, would have amounted to a revocation; except that the terms will or codicil in writing in the first part of the revoking clause, being referred, in the construction of them, to the same words in the devising clause, it was held, that a second will or codicil in writing, amounting, as such, to a revocation of one already made whereby lands were disposed of, must be such an one as would be effectual to convey lands within the devising clause of the statute, and, therefore, so qualified as the former

clause required: for, after the statute, no instrument could be called a will of land, when every devise therein respecting land was void, which every devise respecting land in a will was, unless the will were conformable to the statute. Therefore, as such will could be a revocation, after the statute, no otherwise than as being a will of land, and a will, void as to land, is not a will of land, such void will cannot be a revocation.

Egglesstone v.
Speke, 3 Mod.
Rep. 258. S. C.
1 Show. 89.
Comb. 156.
Carth. 79. et
vid. 2 Atk. 272.
S. L. per Lord
Cowper in
Hyde v. Hyde
infra, et 1 Eq.
Ca. Abr. 409.
3 Ch. Rep. 83.
See vid. Hoile
v. Clarke,
3 Mod. 218.
cont. by two
Judges to one.

Thus where, on a special verdict, it was found that J. S. by will, executed according to the statute, devised the lands in question to A.—and the Jury also found another writing published by the testator as his last will, *in the presence of three witnesses*, revoking all other and former wills; and that the witnesses in the last will subscribed their names to it *where they could not be seen by the testator*; which writing also gave the lands to A.—The last instrument not being good as a will to pass lands, because the witnesses did not subscribe their names in the testator's presence, the question was, Whether it was not a good writing, within the statute of frauds, to revoke the former will? *Et per Curiam*, it was not; for a second will must be a good will in all circumstances to revoke a former will.

So,

So, in the case of *Onyons and Tyrer*, where one made his will, duly executed and attested according to the statute of frauds and perjuries; and, some time after, having a mind to change one of the trustees, he ordered his will to be wrote over again without any variation whatsoever from the first, save only in the name of the trustee, and when it was so wrote over, he executed it *in the presence of three witnesses*, and the three witnesses subscribed their names, *but not in his presence*. The question was, Whether this second will, not being good as a will to pass lands, should yet be a revocation of the first? And it was held that it should not.

Onyons v. Tyrer, 1 P. Will. 343. S.C. Pra. Ch. 459. 2 Vern. 741. Gilb. Rep. Eq. 130,

With regard to the second mode of revocation pointed out by the statute, namely, by burning, tearing, cancelling, or obliterating, &c. it is necessary to observe, that, these acts being of such a nature as that they may happen, and *that* by the means of the testator himself, and yet without an intent in him to revoke, they cannot of themselves be considered as substantive revocations; but must be viewed relatively, with allusion to the temper of mind of the testator at the period when they happen; for these acts are only considered as furnishing evidence of the intent of the testator to revoke, revocation by a devisor being an act of the mind, which must be

be demonstrated by some outward or visible sign or symbol. It follows therefore, that, as neither of these acts, unless done *animo revocandi*, will amount to a revocation, they being in themselves equivocal, to make either of them a revocation, it will be necessary to shew *quo animo* it was done ; because, unless it appears to have been done *animo revocandi*, it will be no revocation ; for, if a man were to throw ink upon his will instead of sand, though it might be a complete defacing of the instrument, it would be no obliterating ; or, suppose a man having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the latter ; so, if a man having a will consisting of two parts, threw one unintentionally into the fire where it was burnt, this would be no revocation of the devises contained in this part. It is the intention, therefore, that must govern in these cases. And, in order to explain such act of cancelling, tearing, burning, and obliterating, parol evidence must be let in. The question therefore of *revocavit vel non* is similar to the question of *devisavit vel non*, viz. a question of fact for the consideration of a jury.

Per L. Mansf.
Cooper 52.

Per L. Cowper,
1 P. Will. 346.

Vid. Titner v.
Titner, cited
3 Wils. 508.

Upon this principle it has been held, that if any of these acts, viz. tearing, burning, cancelling, or obliterating,

obliterating, be performed in the slightest manner, this, joined with a declared intent, will be a good revocation (for it is not necessary that the will or instrument itself should be totally destroyed, or consumed, burnt, or torn to pieces) because the change of intent is the substantive act, the fact done is only the sign or symbol by which that intent is rendered more obvious.

Thus, where an ejectment was brought to try the question, whether a will was duly revoked, it appeared in evidence that the testator (who had for two months together frequently declared himself discontented with his will) being one day in bed near the fire, ordered M. W. who attended him, to fetch his will, which she did and delivered it to him, it being then whole, only somewhat erased. That he opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off, then rumpled it together and threw it on the fire, but it fell off. That it must soon have been burnt, had not M. W. taken it up, which she did, and put it in her pocket. That the testator did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at; to which she made little or no answer. That the testator at several times afterwards said, that was not and should not be his will, and bid her

Bibb on the
Dem. of Mols
v. Thomas,
2 Blackst. Rep.
1043.

her destroy it. That she said at first, So I will, when you have made another; but afterwards, upon his repeated inquiries, she told him that she had destroyed it, though in fact it was never destroyed; that she believed he imagined it was destroyed. That she asked him who his estate would go to when the will was burnt? he answered, to his sister and her children. That he afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother J. M. and desired the person would tell his brother so, and that he wanted to see him. That he afterwards wrote to his brother, saying, "I have destroyed my will which I made; for, " upon serious consideration, I was not easy in "my mind about that will" and desired him to come down, saying, "If I die intestate, it "will cause uneasiness." The testator however died without making another will. The Jury, with the concurrence of the Judge, thought this a sufficient revocation of the will; and so it was held to be by Lord Chief Justice *De Grey*, *et totam Curiam*, on a motion for a new trial and the rule discharged: the Chief Justice observing, that this case fell within two of the specific acts described by the statute of frauds; it was both a burning and a tearing: and that throwing it on the fire, with an intent to burn, though it was only very slightly singed

singed and fell off, was sufficient within the statute.

And if there be two parts of a will, and the devisor cancel, burn, tear, or obliterate one part, *amino revocandi*, that will be a revocation of the other. So it was held in Sir *Edward Seymour's* case, who, a little before his death, sent for his will out of his scrutore, and, in the presence of several persons, cancelled it, saying, "*I cancel my will,*" and desired them to bear witness to it. This was looked upon as a sufficient cancelling the duplicate that he had not by him.

Cited Comyns
453. S. C. 1 P.
Will. 346.
2 Vern. 742.

And the same point was so decided in the case of *Burtonshaw and Gilbert*.

Burtonshaw v.
Gilbert, Vid.
supra 552. et
Cooper 49. et
Onyons v. Ty-
rer infra, et
Pre. Ch. 460,
461.

This principle, that the effect of the obliteration, cancelling, &c. depends upon the mind with which it is done, having been pursued in all its consequences, has introduced another distinction not yet taken notice of; namely, *that* of dependant relative revocations, in which the act of cancelling, &c. being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not.

Thus

Hyde v. Hyde,
1 Eq. Ca.
Abr. 409.
S. C. 3 Chan.
Rep. 155.

[638]

Thus where a man made his will in writing, and, thereby, devised his real and personal estate to pay his debts and legacies, &c. and concluded, "In witness whereof, I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof to be left in the hands of A. B. set my seal to every sheet thereof, and to the last of the said sheets my hand and seal in the presence of three witnesses," who all subscribed their names in due form of law. Afterwards the testator, being minded to add other trustees and make some alterations therein, sent for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener did accordingly, and the testator read, approved, and set his hand to; and being at a tavern, and thinking he had made a new will, he pulled the first will out of his pocket, and tore off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing? he replied, that he was cancelling his first will. The scrivener desired him to hold his hand, informing him that the other will was not perfected; for it would not pass real estate for want of being executed pursuant to the statute of frauds and perjuries. The testator replied, he was sorry for that, and immediately desisted from tearing off any more of the seals. In a short time after the testator

testator died without having done any thing further to perfect the second will, or to cancel the first: and, on a bill brought by the legatees against the trustees, to have a specific performance of the trusts in the first will, and that the estate might be sold pursuant to the directions therein, it was insisted that the first will was revoked, either by making of the second, or by the tearing off the seals from the first. But *Cowper*, Chancellor, held, that the subsequent will could be no revocation, *as to the real estate*, not being executed according to the statute of frauds; and that, as to the tearing off the seals from the first eight sheets of the first will, that not being done *animo cancellandi*, was no revocation; for, as soon as the testator was told that the other will would not be sufficient to pass his real estate, he immediately desisted, and left the last sheet entire and uncancelled.

So, in the before-mentioned case of *Onyons v. Tyrer*, the testator having, after making the second will executed as before stated, cancelled the duplicate by tearing off the seal; one question was, Whether the cancelling of the former will was a revocation thereof within the statute of frauds and perjuries? And it was held that it was not; because that was no *self-subsisting independant act*, but done to accompany or in way
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Onyons v. Tyrer, supra 633, et vid. *Hyde v. Mason*, 2 Eq. Ca. Abr. 776. S. C. 8 Vin. Abr. 140. Pl. 17. *Comyns* 451. 4 Burr. 2515.

of affirmation of the second will ; it was done from an opinion that the second will had actually revoked the first, which induced the testator to tear *that* as of no use ; therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it ; for, though a man might, by the statute of frauds, as effectually destroy his will by tearing or cancelling it, as by making a second will, yet, when he intended to revoke the first will by the second, and it was insufficient for that purpose, as in the principal case, and the tearing and cancelling the first was only in consequence of his opinion that he *thereby* made good the second will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked.

It is necessary here to observe, that Lord Cowper, in deciding on this case, founded his judgment, on the effect of the *second* will, upon the same principle as that which governed his opinion respecting the cancelling ; observing, that here was a disposition of the same lands in the second will to the same purposes as in the first will, which shewed that the testator did not mean to revoke his first will as to the devise of these lands, unless he might, by the second will (at the same time that he revoked the former)

former) set up the like devise, so as to take effect by his second will; and that, his second will being never so perfected as to make the devise of the lands therein to be good, the same devise stood unrevoked by the former will.

And Lord Cowper, as the case is stated by *Peer Williams*, observed that, even if the estates in question had been given to a third person, yet it would not have let in the heir; in regard the meaning of the second will was, to give to the second devisee what it had taken from the first, without any consideration had to the heir, and, if the second devisee took nothing, the first could have lost nothing.

But it is submitted that these cases rather fall under the distinction before-mentioned, on the construction of the word Will in the revoking clause, as referred to the same word in the devising clause; especially as that appears to have been the ground on which the case of *Egglestone* and *Speke* was determined, although in that case, the testator had devised the lands to the same person in the second will as was to have taken them in the first.

And the ground for referring such case to that principle would be still stronger, if the second

T t will

Supra 631.

will had given the land devised in the first will to a third person ; because, otherwise, it must come within the principle of those cases of devises of land void in respect of the incapacity of the devisee to take, which, as has been shewn, have nevertheless been deemed revocations ; for, in those cases, the argument, that the testator did not mean to die intestate, but intended that the one devisee should take what the other lost, and the other lose what the last took, is applicable : because, the statute of frauds only affected wills in those circumstances which are therein particularly specified, in all other respects it left them as they were at common law. Therefore, as before the statute, it was as much of the essence of a will that there should be a devisee capable to take, as, since the statute, it is of the essence of a will that it should be executed according to the forms prescribed by that statute, and, that statute has not altered the nature of a will in respect to the existence of a devisee capable of taking, a devise made since the statute in favour of a devisee incapable of taking, will still be a revocation of a former devise, and yet the latter devise will itself be void ; why, then, as a void will was, at common law, a revocation, and revocations at common law have not been altered by the statute, a void will must be still a revocation, though its inefficacy arises under
the

the statute, unless some new ground is furnished by the statute to distinguish the cases: And it seems to have furnished that ground, if the word 'Will, in the statute, be construed to import a will *duly made* according to the forms required thereby; and this mode of viewing the subject is the more desirable, as, thereby, that beautiful analogy, which renders the common law of this country one of the most complete and noblest systems in the world, will be preserved pure and unblemished; than which nothing can more conduce to the benefit of those whose rights are to be decided by it, as it leads to the establishment of that certainty of decision which is the perfection of all human jurisprudence.

A will may be good as to part, although other parts thereof have been obliterated by the testator subsequent to its execution.

Thus in *Sutton v. Sutton*, which was a case out of Chancery for the opinion of the court of King's Bench, the facts stated were, that S. being seised in fee of a house at Bath, and of other freehold estates of the yearly value of 300*l.* and of other estates of the value of 500*l.* a year in remainder after the death of his father, made his will, and thereby gave all his lands in possession, reversion, or remainder, *except the house at Bath,*

Sutton v. Sutton,
Cooper 812.

upon trust to sell and dispose of the said lands; and to place the money arising therefrom upon real security, and out of the interest and produce thereof, to pay his wife four hundred pounds a year, in lieu of so much a year which she would be intitled to by their marriage-settlement. And he gave to his wife, *in satisfaction of the remaining 50l.* which she could claim by the settlement, *bis bouse in Bath* for her life, and, after her death, devised it to his eldest son. After reciting his wife's being *enseint*, he gave to such child, whether son or daughter, 3000*l.* to be paid out of the monies arising by the *sale* of the lands, and to be paid at his or her age of twenty-one. He did further by his will direct, that, when the estates directed by him to be sold, were actually sold and the monies arising from them invested in the said securities, 100*l.* a year should be given to his wife for the bringing up of his daughter M. and any after-born child: and if his said daughter, or such after-born child, should happen to die before his or her legacy should become due, that then such legacy should sink into the *residuum* for the benefit of his son. After some pecuniary legacies he gave the rest, residue, and remainder of his estate, &c. to his son; but, in case he should die before twenty-one without issue, he then gave and bequeathed the same residuary estate to the child with which his wife was *enseint*, if a son, as *bis*

his own for ever; but, in case such child should prove a daughter, then he gave the same residuary estate between his two daughters as tenants in common. At the time of making his will the testator had a son and a daughter, and his wife was *enf*eint with another child (a daughter) afterwards named J. M. After the date of the will the testator sold his house at Bath, and had two daughters born, J. M. and A. S. After the sale of the house in Bath, and the birth of his two daughters, the testator, in his own hand, made the following alterations in his will; but the making thereof was not attested, nor the will republished.—In the devise to the trustees *the exception of the house at Bath was struck out*—In declaring the trusts of that devise, so far as related to his wife's annuity, he *interlined* the word “fifty,” so that the annuity was altered to 450*l.* *The bequest to his wife of the house in Bath was STRUCK OUT*, and *the remainder to his son.* The recital of his wife's being *enf*eint, and the legacy of 3000*l.* were STRUCK OUT, and, instead thereof, he inserted these words, “I give to my two daughters J. M. and A. S. 2000*l.* each.” In the direction for bringing up his daughters he made the word “daughter” *daughters*, and instead of the words “*after-born child*,” he inserted the names “J. M. and A. S.” In the clause respecting the lapse of the legacies, the

word "daughter" was made plural, the words "after-born child" were struck out, and, instead of "'bis or ber" the word "their" was inserted. He also made alterations as to his pecuniary legacies. The residuary devise to the child of which the wife was enfeint was likewise struck out, and instead of the word "two" before "DAUGHTERS" he substituted the word THREE. The question referred to the opinion of the Court was, Whether, by the will of the testator, as altered, obliterated, and interlined by him, any, and what part, of the real estate therein mentioned, passed thereby to any person, and to whom? Which depended upon whether the alterations and obliterations in the will amounted to a total revocation of it with respect to the real estate? And the Court (declining to give any opinion as to the legacies to the daughters, recommending the decision of that point to be deferred until the son, then an infant, should come of age) as to the devise to the trustees to sell, were clearly of opinion it was not revoked but continued in force; and they certified accordingly.

I now come to the third mode of revocation mentioned in this 6th clause of the statute, in respect of which the reader cannot but have observed, that it materially differs, in the forms

prescribed to attend the execution of a writing for the purpose of revocation, from those prescribed as to a disposing will in the enacting clause, inasmuch as the former requires the instrument (which may be either a will, or codicil, or other writing) by which a former will is altered to be signed in the presence of three or more witnesses; whereas the devising clause requires the will to be signed by three or more witnesses in the *testator's presence*, but does not require that they should be present together when he signs. This difference in the wording of the clauses seems to have laid the foundation for a distinction between a will, &c. to revoke merely, and a will, &c. to devise and revoke; for, if the object of a will be to devise and revoke, that is, if it be meant to be an effective, operative, disposing will, if it fail *as such*, it cannot take effect as a revoking will, &c. though it be an instrument *duly* executed according to the forms prescribed by the *revoking* clause; because the altering a will according to the third branch of the revoking clause must be understood of an alteration *by revocation* merely, and not of an alteration by an *inconsistent disposition*, which can only be made by a disposing will executed pursuant to the devising clause; for, if it were otherwise, the first branch and the last branch of the revoking clause would clash, since, by the *last* branch of it, no will could be revoked by another will unless it were signed by the testator

in *the presence* of three witnesses, whereas, according to the *first* branch of the revoking clause, a latter will may be revoked by a will, codicil, or other writing, which, in the construction of these words, has been expounded to intend a will, &c. made according to the forms required by the devising clause, (*i. e.*) signed by three or more witnesses in the testator's presence. So that if a man would alter his will by revocation only, he may effectuate it either by a *strict* will executed pursuant to the devising clause, or by a revoking will executed according to the revoking clause; but, if he would alter his will by disposition and revocation, he can only effectuate that intention by a strict will, conformable to the devising clause.

Supra 93, 632,
633, 639.

The foregoing observations seem to be warranted by the decisions in the cases of *Eglestone* and *Speke*, and *Onyons* and *Tyler*; for, in those cases, the latter instruments were executed in the presence of three witnesses, as the revoking clause required, though they were not signed by the witnesses in the presence of the testator as the devising clause required; but, being intended to take effect under the devising clause, and not under the revoking clause, they were held void and ineffectual as to both purposes; and would have been equally so if the dispositions in them had been to third persons instead of

of to the original devisees; because the disposition to third persons would have furnished the same evidence of the testator's intent to proceed under the devising clause, and not under the revoking clause.

And, if this mode of considering it be right, the proposition, put by Lord *Cowper* on opening his judgment in the case of *Onyons and Tyrer*, will be good law; namely, that if the testator had by his second will barely revoked the first, without declaring by the same act his intention to dispose of his lands to the same purposes to which they were devised by the former will, or to a third person, or, if the latter will had only extended to the personal estate, and barely revoked the first as to the real estate, the second will had been a good revocation of the former as to the lands devised; the ground of which opinion must have been that then, as to the land, the last will would have been a mere revoking will, and, being duly executed according to the revoking clause in the statute, would, as such, have revoked the former devising will.

Vide 1 P. Will.
344. last edit.
Note 1.

A will, made under the revoking clause in the statute, will not be valid for that purpose, although there be a signature by the testator on the face of the instrument, unless that signature

was

was intended by the party to give authenticity to the revoking instrument; for the name of the testator inserted on the body of the instrument and applicable to particular purposes, will not amount to such an authentication as the statute requires.

Hilton v. King,
3 Lev. 86.

Thus where K. seised of the tenements in question in fee, devised them to his daughters D. and S. and their heirs, and the will was duly made and signed, and the name of the testator written at the bottom of it. Afterwards K. having an intention to revoke the will as to D. directed the following words to be written on his will, viz. "We, whose names are underwritten, do testify that the above-named K. did, the day of the date hereof, publish and declare that the several clauses and devises in his will, any way relating to his daughter D. should cease and be void, she being since married and her portion paid: in witness whereof we have hereunto set our hands this 28th day of October 1680;" and the same was subscribed by four witnesses in his presence, but K. *did not sign the same nor any other person by his direction or by him authorised.* These revoking words were written on the *same* side of the paper on which the will was written, and immediately under the testator's name subscribed thereto. And the question was,

Whether

Whether this were a good revocation according to the statute of frauds, not being subscribed by K.? And, on the first argument, *North* Chief Justice, and *Levinz*, held that, inasmuch as the devisor's intent appeared fully in writing, and so there was no doubt of fraud and perjury, the signing by K. on the same paper would serve for all, and that it was not material whether it were signed on the top or bottom of the will or writing; because the statute did not say *subscribed*, but signed. But afterwards, *North* being removed and *Levinz* sick, it was held by *Pemberton*, Chief Justice, and *Wyndham* and *Charlton*, Justices, that this was not a signing within the statute.

O F

R E P U B L I C A T I O N.

A Devise, if not actually obliterated and destroyed, may, although revoked, be revived by a subsequent republication; for, being an ambulatory instrument, deriving its efficacy from the will and intent of the testator, it may be rescinded, suspended, enlarged, or contracted as to its operation at the pleasure of the deviser. And as, previous to the statute of frauds and perjuries, parol declarations were sufficient to revoke, so were they also sufficient to republish a devise.

At common law, very slight words effected a republication of a will, it being an act peculiarly favoured. As the same rule still applies in cases of copyhold devises, &c. I shall first advert to the nature of a Republication at common law, and then consider Republications as they stand at present.

Trevillian's case,
Dyer 143 a. b.
Bendloe 38. PL
151. East. 2
Eliz. et vid.

In *Trevillian's* case, before-mentioned, it being found that the testator after the 32 Hen. VIII. namely,

namely, in the 37 Hen. VIII. *repetivit affirmavit,*
et allocavit, dictam ultimum voluntatem absque
nova scriptura inde, vel data vel facta de novo;
 judgment was given by the Court of Common
 Pleas unanimously in favour of the devisee.

Cheesman et
 Turner, Stiles
 343, 1652. Et
 Sir J. Bridges
 et Lord Chan-
 dos, ibid 418,
 1654. S.L. per
 Rolle, Chief
 Justice.

And *Rolle* in his Abridgment of the case of *Montague* and *Jeffries*, in which many points are stated as having arisen which are not taken notice of by any other reporter of this case, states, as one point resolved, this position, viz. If one seised of land devise his lands to J. S. and afterwards purchase the manor of D. and then deliver the first will as his will, this is a new publication to make the late purchased lands pass.

i Rolle Abr.
 618. Pl. 6. 7.

And the following cases seem fully to support the above proposition in *Rolle*.

P. seised of lands in A. and having issue four daughters, viz. B. J. F. and M. made his will, and thereby devised all his lands in A. to B. and J. and constituted them his executrices, and then purchased other lands in A. After which J. S. came to P. the devisor, and desired that he would sell unto him those lands which he had lately purchased: but he replied, "No, they shall go with my other lands in A. to my executrix's." And then, he being sick, the will was

Beckford verf.
 Parnicot, Cre.
 Eliz. 493.
 Mich. 38, 39
 Eliz. S. C.
 Moore 404.
 Gouldsb. 150.

read

read unto him, and he said nothing therefo. On the devisor's death one question was, Whether, by those words used to a stranger there was a new publication of his will to make the new purchased lands pass? And it was held by *Fenner, Clenck, and Popbam, absente Gawdy*, that this was a new publication of the will to pass those lands, the words used by J. S. being sufficient to shew his intent.

Cotton v. Cotton, 2 Ch. Rep. 72, 73. in Chan. 1677, 30 Car. 2. S. C. 1 Freeman 264. Mich. 1679, 32 Car. II. in Com. Pleas, where it is stated that the case upon the point of re-publication was sent to a trial at law and found specially by Lord Chief Justice North's direction, and on a solemn argument before all the Judges of the Com. Pleas determined, unanimously, in favour of the devisee; et note this re-publication must have been before the statute of frauds; but the express words are not there stated.

Again where A. feised of several lands in D. made his will, and devised his lands in D. and all other his lands and tenements whatsoever unto his wife; and then A. purchased other lands, and being afterwards discoursing with B.—B. desired him to let him have those new purchased lands at the rate at which he bought them; but he answered No, for that he had made his will and settled his estate, and intended that his wife should have the whole of it. And the question was, Whether this should amount to a new publication of his will, so as to pass the new purchased lands? It was argued by Serjeant Maynard, that it should not, because it was not averred that he spoke those words *animo testandi*. But the Court inclined strongly that this was a new publication, and applied particularly to the lands, and that it was no matter for alledging *quod dixit animo testandi*, for *that* must necessarily be intended when the discourse had particular reference to the will.

But the last-mentioned case is differently put ^{2 Vern. 259.} as to the words used by the devisor by way of republication in *Vernon*; the question being there stated to have turned upon the testator's saying, " his will was in a box in his study," which was held by Lord Chief Justice *North* to have been a republication.

And the same case seems also to have received ^{2 Show. 41.} an adjudication in the Court of King's Bench; for, in a short note of Easter Term, 31 Car. II. it is said to have been resolved there, by all the Court, on a trial at bar directed out of Chancery, that these words " my will in the hands of J. S. shall stand," amounted to a good republication.

So any act of the devisor done subsequent to the revocation of his will, by which he demonstrated an intent that it should stand, amounted to a republication.

As if a man had devised his land, and afterwards had aliened it to a stranger, and then had repurchased it; and then, being on his death-bed, and it being brought to him, he had been desired, if it were his last will, to deliver it to A. a stander by, as a signification thereof, and, if it were not, then to retain it, and he had delivered it

⁴⁴ E. III. 33.
² R. 3. 3.
¹ Roll. Abr.
617. 2. 1.

it to A. this, it seems, would have amounted to a republication.

Hussey's case,
supra 582.
1 Rolle Abr.
617. Z. 4.

So in *Hussey's case* before-mentioned, though a subsequent feoffment to the use of the feoffor's will was held to be a revocation of a will *previously made*; yet, the reference of the feoffment to the will was held to give it effect, that operating as a new publication.

Montague *vers.*
Jeffries, 1 Rolle
Abr. 618. 8.

But if a man had devised land in fee to J. S. and made his own daughter executrix, and had afterwards made a feoffment in fee to a stranger to the use of himself for his life, the remainder to his wife for life, the remainder to his own right heirs; and then the devisor had added and inserted these words in his will with his own hand, "I make my wife and my daughter my executrices of this my last will and testament," and had also put in and interlined a trustee in lieu of one named in the will, who was dead, and had inserted a new legacy to his wife; it seems that these acts had been no republication for the land: because the making new executors and giving a legacy do not affect the land, nor shew any intent that this shall be his will for his land but only for his goods. But the reporter adds a *dubitatur*.

Vide infra, some observations on this point.

But

But Lord *Hardwicke*, in the case of *Carte* and *Carte*, said, there was no doubt but that the addition of a codicil was a republication of a will. But this position requires some discussion, as several nice questions have been made thereupon.

3 Atk. 180.

In the case of *Beckford* and *Parnecott*, before-mentioned, it was found, by special verdict in ejectment, that the testator, after making the new purchase of lands, had the will read to him, and said nothing, but gave several legacies of goods, and caused them to be written and annexed thereto in a codicil; and one question was, Whether the annexing the codicil to the will, *it respecting goods only*, was a new publication thereof to make the lands pass? And the reporter states, that *Fenner*, Justice, held, that the annexing the codicil thereto was a new publication; for, thereby, the testator affirmed that it should be his will at *that* time: but the other Justices doubted thereof; because he did not shew thereby any intent that this will should be for his purchased lands, nor that he then remembered them. And, afterwards, *Fenner* came into the opinion of the rest of the Justices on the other point.

Beckford v. Parnecott,
Supra 653.
Cro. Eliz. 493.
S. C. 1 Roll.
Abr. 618. 8.
and this case
is there said
have been de-
termined on
the ground of
the codicil an-
nexed; et
S. C. 1 Eq. Ca.
Abr. 406. Pl. 5.
but in the prin-
cipal reporters
it is stated
otherwise.

N. B. Gawdy
distinguished
between a new
publication
and a mere al-
lowance,
Gouldsh. 150.

Vil. supra 653.

In the case of *Alford* and *Alford*, which was a devise of a lease that was afterwards renewed

U u by

Alford v.
Alford,
1 P. Will. 168.
2 Vern. 209.

Supra 584. by changing a life; it was held that a codicil,
 (a) ^(a) See a like annexed to the will after the renewal, though it
^{Determin' in}
^{process Chanc.}
^{Rept Vol: 61}
^{p 2.} took no notice of the lease, was a republication of
 the will. (a)

And a codicil, though *not annexed* to a will, is a republication, if it clearly relates to the *subject matter* of the will, thereby plainly evincing that the testator *contemplated* THAT as his will, *at the time of* the codicil made.

Acherley v.
 Vernon,
 Comyns 381.
 S.C. 9 Mod. 68.
 3 Brown's Ca.
 Par. 2 Eq. Ca.
 Abr. 769. 1.
 1 Vez. 443.
 S. L. Rider
 v. Wager,
 3 P. Will. 329.
 et supra 594.
 616.

Thus, where V. by his will, dated 17th January 1711, after several devises, gave the residue of his real and personal estate to trustees, their heirs, executors, and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and that his trustees should stand seised and possessed of his real and personal estate to the uses therein mentioned. Afterwards V. purchased several fee-farm rents, affart rents, and lands and tenements, some of which rested on agreement only. Then V. by a codicil, made two days before his death, reciting, that he had made a will, dated 17th January 1711, thereby ratified and confirmed the will, except in the alterations thereinafter mentioned. He then made several alterations in his legacies and devises, and gave all the lands by him purchased since his will, to his trustees and executors

in his will named, to the same uses, and subject to the same trusts to which he had devised the bulk of his estate; and then he revoked his will as to three of the trustees therein, and nominated two new ones in their stead, and devised his estates to them accordingly. It was, among other things, objected, that the codicil, *being by a separate and distinct instrument*, did not amount to a republication of the will: but it was decreed in Chancery, by Lord *Maclesfield*, that the testator's signing and publishing this codicil was a republication of his will, and both together made but one will; and that, thereby, the lands contracted to be purchased, and all his real and personal estate did well pass. And this decree was affirmed on appeal to the House of Lords.

So, in the case of *Potter and Potter*, where one devised his manors of A. B. and C. and all his messuages, lands, tenements, and hereditaments, in the county of —— or elsewhere in any part of *England*, subject to an annuity, to the use of P. for life, remainder, &c. and, afterwards, entered into an agreement for the purchase of lands; and, then, made two codicils, the latter of which was on a *separate paper*, and though not dated, was agreed to have been made about four or five days before his death; and recited

*Potter and
Potter,
1 Vez. 437.
Supra 207.*

therein that, having in his will appointed several limitations and remainders of his estate; some of which were not agreeable to his present intent, he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts which should not interfere therewith. This paper was attested as " signed, sealed, and published, and *declared* by the testator, as a codicil to his last will and testament." It being contended, that the first codicil would not amount to a republication of the will as to the lands newly purchased, the agreement respecting them not being to be carried into execution until subsequent to the date thereof; the question was, Whether the last codicil, which was subsequent to the time stipulated for carrying the agreement into execution, was a republication of the will as to these lands? And it was contended, that it could not be a republication, because it was not by way of indorsement, or annexed to the will, or shewn that the will itself was at that time before the testator. But Sir John Strange, Master of the Rolls, was of opinion, that, notwithstanding these objections, the latter codicil amounted to a republication; because it was an express declaration, that the rest of his intent, not inconsistent therewith, should continue and be confirmed; and his honour said, that it might be mischievous

chievous to hold, that no republication could be, but by the testator's taking the will in his hands and republishing it by an indorsement on it, or annexing the codicil to the will itself; the person intending to republish might be at a distance from the will itself, or might not have it in his power, by its being in custody of another; and the testator might know the substance, though he could not repeat the particulars.

And it was admitted by the counsel, in the case of *Gibson* and *Montfort*, that, if there was, in a codicil, a general clause of confirmation of a will; as if the testator therein say, “*I confirm my will,*” this would make *that* codicil amount to a republication; because it would be the same as if the testator had republished every devise in the will over again. And of that opinion was *Lord Hardwicke*.

Gibson v. Montfort, 1 Vez. 489, 493, et *Potter v. Potter*, 1 Vez. 437. et *supra* 207. 659.

This point was also so decided in the case of *Doe on Dem. Pate v. Davy, Cooper 158.* D. by will, in 1767, after giving several legacies, made the following residuary devise; “And, as to all the rest and residue of my estate, of what nature, kind, and quality soever, I give, devise, and bequeath the same unto W. P. &c. according to the nature of the respective estates.” The testator then purchased some customary

estates, and afterwards surrendered them to such uses, intents, and purposes, as he should by his last will and testament in writing thereof direct, limit, and appoint. He then made a codicil, by which, reciting that he had, by his will, devised all his fee-farm rents in manner therein mentioned, he devised the same to C. D. &c., and then proceeded as follows: "I do hereby ratify and confirm all and every the gifts, devises, and bequests contained in my said will, except what I have hereby altered. And I do desire, that this present writing may be annexed to, accepted, and taken as a codicil to my will, to all intents and purposes." And the question was, Whether the execution of the codicil, subsequent to the purchase and surrender of the copyhold estates, amounted to such a re-publication of the will as to pass them? In favour of the heir at law, an attempt was made to distinguish this case from that of a devise of freehold, upon the ground, that at the date of the will the testator had no copyhold estate, clearly then he had no intention to pass any estate of copyhold to the devisee. Then he, afterwards, purchased the lands in question, and surrendered them to such uses as he should declare by his last will, not to the uses DECLARED or to be declared by his last will. He then made a codicil, by which he ratified and confirmed

confirmed every gift in his will, except what he had particularly altered by it. This then, it was said, was a ratification only of what he had before expressly given by his will. But, the will contained no gift or devise of any *copyhold* lands, nor did the codicil refer to any; on the contrary, it was clear that the only object the testator had in adding the codicil was, to make the particular alteration there mentioned; consequently the copyhold lands were undisposed of, and the heir at law was entitled to them by descent. *Sed per Curiam*, the case of *Achberley and Vernon* is in point, that the codicil, reciting that the testator had made his will, and *ratifying and confirming it* in the alterations aforementioned, was a republication of the will, and both together made but one will, whereby the lands purchased after the will passed,

And Lord *Hardwicke*, in the above-mentioned case of *Gibson and Montford*, thought that, if the proposition there admitted was law, then any other words that amounted to a confirmation of a will, would do as well as words expressly confirming it. And, therefore, that the codicil in the principal case reciting that,
 " whereas the testator had, by his last will of
 " such a date, given and devised to his exec-
 " cutors a sum of money in trust for A. and

Gibson v.
Montford,
1 Yez 489,
493, supra 661.

" another in trust for B. he revoked those legacies, and DESIRED that writing should be a further part of his said last will and testament," amounted to a republication to give the will operation upon lands subsequently purchased, under a sweeping clause, "as to all the rest, residue, and remainder of the testator's real and personal estate of what nature and kind soever;" for, his Lordship said, though there were not the words, *I confirm my will*, yet there were the words I DESIRE, &c. between which and an actual confirmation there seemed very little distinction. But the case going off upon another ground, no judgment was given thereupon.

Acherley v.
Vernon,
Comyns 281.
9 Mod. 78.
1 Vez 442.
Ca. T. Holt
748. 252.

^a Note, this statute does not extend to copyholds, vid. Burkett v. Burkett, 2 Vern. 498. Eq. Ca. Abr. 402. 4

Before I make any further observations upon this part of my subject, I shall advert for a moment to the statute of frauds and perjuries, and consider what effect that had upon republications of wills relating to land. And it is held that, since that statute, no codicil can amount to a republication of a will of land, unless it comply with the forms thereby required, and be signed and published by the testator in the presence of three witnesses, who attest the same^a.

Hall v. Dunch,
supra 615.
1 Ja. II.

And, in the case of *Hall* and *Dunch*, the question, Whether this statute extended to republications

tions by parol was agitated ; for, it being proved, in that case, by four or five witnesses, that the testator, after the mortgage, declared that his former will should stand ; Sir *John Churchill*, Master of the Rolls, though it was objected that such parol declarations, since the statute of frauds and perjuries, would not amount to a new publication, was of opinion, *that they would* ; observing, “ that there were four things “ which equity favoured, livery, attornment, “ assent to a legacy, and the new publica- “ tion of a will ; in either of which cases, he “ said, a slender evidence would serve the “ turn.” However, the case was decided by the Chancellor, upon an appeal, on a different ground.

But this opinion of the Master of the Rolls has since been over-ruled ; it having been held, that the devising clause in the statute of frauds and perjuries put an end to all parol republications of devises of lands, as the revoking clause did to all parol revocations ; since the admitting them would be attended with all the inconvenience, mischief, and fraud, that the statute was intended to obviate. In the spirit of it, therefore, though not in the express words, it extended to these cases ; for the effect of a republication is to devise, and the statute says, “ that all devises of
“ lands

"lands and tenements" shall be made as therein is directed.

Martin v. Savage, Mich.
14 Geo. II.
cited, *Vez.*
440, et vid.
9 Mod. 78.
Barnard 192.

Thus Lord Hardwicke held, in the case of *Martin* and *Savage*, that parol evidence of a republication could not now be admitted, as it would elude the statute of frauds. In that case the testator declared, "that his will was in the " custody of S. and that it was and would be " still his will;" and the point was, Whether this declaration, which was subsequent to a settlement by fine that had revoked the will by altering the estate, was a republication of the will? And it was decided by his lordship, that it was not a republication.

But, as constructive revocations were, in the exposition of the revoking clause of the statute of frauds, considered as out of its purview; because constructive revocations do not depend upon any parol declarations of the devisor, but are consequences of law arising from facts, the existence of which is capable of proof, without recourse to the parol declarations of the devisor, not liable to misrepresentation, and independant of any intent to revoke expressed; so, republications, wherever the analogy holds, seem likewise to be out of the statute: for, where the republication is a conclusion from facts, and does

not

not depend upon parol declaration, the case is considered as not within the statute. As in the case of a testator's making two wills, the latter of which is repugnant to the former, and of course a revocation of it; yet, in that case, if the testator destroy the last and leave the first perfect and unobliterated, those acts taken together amount to a republication; because such transactions are not within the statute, *not being exposed to the mischiefs it was intended to remedy.*

As to devises of leasehold estates, the law of republication remains the same as it was before the statute of frauds. And Lord Hardwicke seems to have been of this opinion, in the case of *Abney and Miller*. There the fact of republication insisted upon was, that the testator, after renewing his leases, being looking for another paper, and the person who was assisting him having taken up his will by mistake, he said "*that is my will,*" not meaning to republish it, *but to shew that it was not the paper he wanted.* And his lordship observed, that to make it a republication, there must be *animus republicandi* in the testator; from whence we may infer, that he was then of opinion, that such a declaration *animo republicandi* would have been effectual,

² Atk. §99,
supra 586,
587, 593.

Having said thus much upon the operation of the statute of frauds as to the republication of wills, it is necessary to recall the attention

of the reader to the part of our subject that relates to the annexing codicils to wills, which, without this digression, might have involved him in some confusion.

We have already seen, Lord Hardwicke was of opinion, that no express words were necessary to make a codicil, not annexed, a republication of a will, if the will were, in effect, confirmed thereby; and that, therefore, a testator's desiring that a writing, in nature of a codicil, should be part of his last will and testament, amounted to a republication, as confirming the will. It remains for us here to observe, that, if that doctrine be true, (and the great principle laid down as to testamentary dispositions, that, in favour of the power of devising, forms of expression shall generally be dispensed with, seems fully to warrant it,) every codicil, if executed according to the statute of frauds, will amount to a republication, though it relate only to personal estate and be not annexed to the will; for, every codicil is undoubtedly a further part of a man's last will, *whether it be said so in such codicil or not*, and, as such, furnishes conclusive evidence of the testator's considering his will as existing at that time. By consequence, then, it is a confirmation of the will, for it is, in law, annexed, all codicils

codicils being, in contemplation of law, fastened to the will, and considered as a part thereof. And Lord Hardwicke, in the case of *Gibson* and *Montford*, seems to have been strongly inclined in favour of this opinion, that a codicil, although only relating to personal property, so executed, would, though not annexed, amount to a republication of a will.

1 Vez. 435.

Upon a close inspection of the authorities that seem to oppose this proposition, they will be found of little weight; consisting either of cases loosely reported, determined by consent, or mere *obiter dicta* not necessarily arising from the cases in which they were flung out by the Court.

The leading case of this description, is that of *Litton* and Lady *Falkland*. The material facts in which were these: L. devised part of his lands to his wife for life, and, as to all other his lands, tenements, and hereditaments *out of settlement*, he gave and devised them to S. and his heirs, upon certain conditions therein mentioned, and, in default of performance of the conditions, then to go over as therein limited. After making this will, L. foreclosed the equity of redemption of several mortgages, and purchased other lands of inheritance. Then L.

made

Litton v. Lady Falkland,
3 Chan. Rep.
90. S. C.
2 Vern. 62x.
Et vid. Lord Lansdown's case, as cited Comyns 384. but the will in that case was not attested, and it involved another question, viz. Whether the word Heir, used as a word of limitation, in a will, could operate by force of a codicil, as a word of pur-

chase? And the case was agreed between the parties, and no adjudication of it. Vid. Pre. Ch. 440. 441. Besides, so far as it affects the point now discussing, it was overruled in Acherley and Vernon.

made two codicils, which he directed should be annexed to his will, giving, thereby, some particular legacies. There were three witnesses to each codicil, but neither of the codicils were annexed to the will, that being in the country. After the death of the testator, it was objected, on a question as to the effect of these codicils, that they, not being annexed to the will, could not amount to a new publication thereof, and, consequently, that the freehold land, purchased after making the will, did not pass thereby. On the other side it was contended, that the making of the codicils, and directing that they should be annexed to his will, would amount to a new publication thereof, though they were not, *in fact*, annexed; because he, therein, *took notice* of his will, and then the new purchased lands would pass. *Sed per Curiam*, consisting of Tracy, Trevor Master of the Rolls, and my Lord Chancellor; the new purchased lands did not pass by the will, the codicils made afterwards not being annexed thereto, and, *therefore*, not amounting to a new publication. And this decree, it is said, was confirmed by the House of Lords.

Cholmondeley v.
Cholmondeley,
cited 1 Vez.
489.

Again, where a codicil revoked a devise of a house, garden, and estate at Richmond, directing it to be sold, and the money arising therefrom to

be

be laid out in the purchase of freehold lands in Cheshire, to be settled to the same uses as directed by the will touching the residue of the testator's personal estate; it was held by Sir *Joseph Jekyll*, Master of the Rolls, that this codicil did not pass lands purchased *after* the will made.

And Sir *John Strange* is reported to have said, in his judgment on the case of *Potter and Potter*, that, if the codicil in that case had only related to personal estate it would not have done; but that was not the question *there* in judgment.

Cited : *Vez.*
489.

On these several authorities these observations occur; namely, that, as to the leading case of *Litton and Strode*, it is very loosely and imperfectly reported both in the Chancery Reports and also in *Vernon*, and no notice is taken in the House of Lords of this part of the case; besides, the point whereupon that case is made singly to rest, viz. the codicil's not being annexed to the will, is expressly over-ruled in the case of *Ackberley and Vernon*. As to the case of *Cholmondeley and Cholmondeley*, that was a cause by consent being heard before Term, and, therefore, not of that weight in an important question that causes conducted adversely are. And, though the Master of the Rolls did observe, in the case of *Potter and Potter*, that a codicil of personal estate *only* would not

not have done; yet, that observation was made merely to distinguish that case from the case of *Litton* and Lady *Falkland*, upon the ground that, in the latter case, the codicil included *an addition of some pecuniary legacies*, and was, therefore, not intended to operate on or affect the land, whereas, in the former case, the whole purport of the codicil was to vary the limitations in some particulars, ratifying the will in all the rest. And Sir *Jobn Strange* went still further, by observing that, in *Litton* and *Falkland*, though the codicil had been annexed to the will, yet he should have thought it not a republication as to the lands, the case of *Hutton* and *Sympson* shewing that the republication depended on the subject matter, not the annexing; a position by no means warranted by the decision in that case, as we shall by and by see.

But, if the ground upon which the cases of *Ackberley* and *Vernon*, and *Potter* and *Potter*, must ultimately stand, be strictly examined into, it seems fully to justify the extension of the principle by which those cases were decided, to such cases as that now under our consideration; for, the broad basis upon which those decisions must be supported is, that the testator, by acting, in the codicil, upon his will as to part of the dispositions therein, and ratifying and confirming it as

² Vern. 722.
vid. *Sympson v. Hornsby*,
infra 676.

to the part not acted upon therein, shewed that he *then* conceived his will as existing, and had a reference to it in his own mind. The law therefore, from its benignity to the testator and its desire to further his intent, being unable to support the will as an existing instrument after revocation, rather than disappoint the testator, considers the codicil as a republication of it; giving it effect from that time as a new disposition. But, why is this done? because the *res gestæ* shew that the testator, when he made his codicil, had a devising mind as to his real estate. Why, then, does not the *res gestæ*, in the case we are now discussing, furnish *equal* evidence of such intent? The executing a codicil clearly imports an idea in the testator's mind that a will is subsisting, and the complying with *all the forms* required by the statute of frauds furnishes *strong* ground to suppose, that the testator has a will *as to lands* in his contemplation; for, unless that be the case, there is no reason for his introducing those ceremonies which that statute imposes upon devisors of real property only. And, if it should be said, that this is refining very much upon the principle, it may fairly be answered, that it is not carrying it further than technical reasoning has done the doctrine of revocation, which so often prevails against the evident intent.

Vid. Lord
Mansfield's
argument in
the case of
Carleton and
Griffin, 1 Bur.
554.

Now the effect of a new publication is, that *all* which the words in the will embrace at *the time* when the new publication is made shall pass thereby; or, to put it more clearly, when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property the testator is seized of, and the persons named therein, at the date of the republication, *just the same* as if he had *had* such additional property, or such persons had been *in esse* at the time of making his will; the conclusion from *that fact* being that the testator so intended. The next consideration therefore upon a will *so republished*, is, what the words of the will at the time of republication import; for, they will operate to their full extent at *that* time, just the same as if the testator had then made a new will. And, therefore, it was held in *Beckford* and *Parnecott's case*, that the words in the will being " ALL THE TESTATOR'S LANDS IN A." and the new purchased lands lying in A. they were apt enough and sufficient to carry them, the will having been republished; nor could more apt words have been added thereto had a new one been made.

Et vide supra
Acherley and
Vernon, Potter and
Potter.

So, if a man by his will give " *all his real estate,*" and afterwards purchase other lands, a republication will affect such newly purchased lands;

lands; because the effect is the same, as to those lands, as if the testator had then made a new will, which had he done, the word “*all*” would have included any lands that he had at that time.

Upon the same principle it has been held, that, by a republication, a person, not in existence at the time of making a will, may be made capable of taking thereby, if he be well described therein.

Thus where M. having two sons, Thomas and Joseph, made his will, giving thereby 1500*l.* to his youngest son Joseph, and his real estate to his eldest son *chargeable with portions*. Joseph the younger son died in the life-time of his father the testator. The father, having afterwards another son whom he named Joseph, *wrote a codicil* at the bottom of his will, by which he confirmed the will, thereby taking notice, that since the last it had pleased God to give him another son, and gave a legacy of 500*l.* to his son Joseph, over and above what he had given him by his said will. And the question was, Whether the 1500*l.* given to Joseph in the first will was a lapsed legacy? And it was held by Lord Chancellor Cowper that it was not; for, that the making the codicil was a republication of the will, and did amount to a substituting the

Perkins vers.
Micklethwaite
1 Will. 275.
Sed nota, Lord
Cowper ob-
served this was
improperly
called a lapsed
legacy, it was
a portion given
over, and he
likewise urged
in support of
his decree other
facts in the
case; but the
principal
ground seems
to be that, here
stated at large.
Et vid. 3 Keb.
847. S. L. by
North, C. J.
et Cheney's
case, 5 Rep. 68.
for though
there be a
change of the
person, yet the
devise is writ-
ten, and is as a
new will by
the publica-
tion.

second Joseph in the place of the first; and was the same in effect as if the testator had made his will anew and had writ it over again, in which case the second Joseph must have taken.

But the effect of such a republication extends no further than to give words, used in the original will, the same force and effect as they would have had, if first written at the time of the republication; consequently if one devise lands by the name of B. C. and D. and, then, purchase new lands, and republish his will, the republication does not bring such new lands within the will; because it speaks only of the particular lands B. C. and D.

And the rule is the same where the alteration in circumstances is in the devisee, and not in the property of the testator; for, in this case, also, none can take by virtue of the republication in any other manner than as is expressed in the will. Therefore where a devisee is intended in a will to take by descent, no republication will so affect that disposition as to enable him to take by purchase; no, not although the words used, standing alone, may operate as words of purchase as well as of limitation.

Sympson vers.
Hornby, Pre.
Ch. 439. S. C.
2 Vera. 722.

Thus, where one, having a wife and two daughters, devised lands in several towns to his wife

wife for life, and after her death to his daughter B. and the heirs male of her body, and, for want of such issue, to his daughter I. for life, remainder over. B. died in her father's life-time leaving issue a son, whom the grandfather took to his house and expressed great kindness for. Afterwards the grandfather made a codicil which began thus, "a codicil to be annexed to my "will," and by that he gave some part of a leasehold estate (which by his will was given to his daughter B.) to her son, and added another trustee for some charities he had given by his will. He then duly executed this codicil; but the codicil was not actually annexed to his will. And one question was, Whether the son of B. could take? and it was held that he could not; for, B. dying in the life-time of the testator, the heirs male of her body could not take by purchase; because these words were inserted to express the quantity and duration of the estate that B. was to take, and not as a description of the person of the heir.

et vid. Lord Lansdown's case, cited Pre. Chan. 440, 441. et Comyns 384. on the same point but not decided, et vid. Bret and Rigden, Plowd. 343. et Fuller and Fuller, Cro. Eliz. 432.

Note. It is said in Vernon that the codicil related to personality only and was annexed; but the judgment turned on the words as used.

And, upon the same principle, it had before been decided, that the word Son, though capable of being applied in a will to a grandson as well as a son, when the testator knew that there was no son in being, could not be taken in that sense where the testator, by giving a legacy to his

Vide Crook v. Brooking, a Vernon 106, 207,

grandson, had evinced his intention to use the word in its proper sense.

Steed verf. Berrier, 3 Mod. Rep. 318. Jones 135. 1 Vent. 340. T. Raym. 408. 2 Lev. 243. 2 Show 63. Note. In this case judgment was given in the Common Pleas by North, Wyndham, and Atkins, Scroggs, then judge, being then of a contrary opinion: and in the court of King's Bench that judgment was reversed by the opinion of Scroggs, Jones, and Pemberton, Dolbin being of a contrary opinion: so that, upon the whole matter, there were four judges against three, and the judgment of the three stands.

The case alluded to is that of *Berrier* and *Steed*. There B. seised in fee of lands, having issue two sons, W. his eldest and R. his youngest, devised his lands to his younger son R. and his heirs. R. the devisee, died in the life-time of his father and left a son named R. who had a legacy devised to him by the said will. B. afterwards annexed a codicil to his will (which was agreed to be a republication) and then he expressly published the will *de novo* and declared, that his grandson R. should have the land as his son R. should have enjoyed it, if he had lived. And the question was, Whether the grandson or the heir at law should have the lands devised? And it was argued, on the part of the heir at law, that, by the death of the son, the devise to him and his heirs was void, and the annexing a codicil and republication of the will could not make that good which was void before, and, if that would not make it good, then the heir could not take by purchase. And it was said, as to the parol declaration, that so far as it went to alter the import of the will, it was not within the statute of wills, which required the whole to be in writing; for the devise by the written will was to the son, and the declaration to the grandson was by words and

and not in writing, so that if he could not take by the words of the will he was remediless. But it was held by the Chief Justice, and *Wyndham* and *Atkins*, Justices of the Common Pleas, that the republication made it a new will, and the grandson should take by the name of Son. But a writ of error being brought on this judgment in the King's Bench, it was reversed; it being there said, that, there being in the will itself a legacy devised to the grandson by that name, it was impossible, where they were so distinguished, to take the grandson to be meant by the name of Son; that, consequently, the republication could not operate to carry the devise to the grandson, and the declaration would not help it, that not being in writing.

A codicil may republish a will as to part only of the lands originally devised, as well as, as to the whole; for the nature of a codicil, as applied to this purpose, is, to give effect to the will according to the words used, as they apply to the situation of the testator's property at *that* time,

Thus, where L. devised one moiety of his real estate, subject to his legacies, to his eldest daughter and her heirs, and the other moiety to his youngest daughter in like manner. Afterwards the testator married his eldest daughter to

Riderv. Wager,
2 Will. 3²⁹.
Supra 594, 616

R. and, previous to the marriage, by articles, covenanted to settle a moiety of his real estate to the use of himself for life, remainder to R. and his wife for their lives, remainder to the younger children of the marriage in tail, remainder to himself in fee. Then he made a codicil to his will, confirming his former will *subject to these marriage articles*. And, it being held, that the articles were a revocation of the will as to a moiety, the next question was, as to the effect of the codicil, viz. Whether it amounted to a re-publication of the will, so as to intitle the married daughter to a moiety of the remaining moiety of the testator's estate? *Et per Curiam*, the testator, by the codicil, confirmed his will *subject to the articles*, which confirmation was a republication of his will, and, as if he had written it over again, or had afterwards, for a valuable consideration, assigned over a moiety of his real estate to his eldest daughter, by which the moiety so disposed of did no longer continue any part of the testator's estate: so that the testator, afterwards, by devising a moiety of his real estate, must be intended to have meant the remaining moiety only; and to have divided that moiety into moieties.

But, as a codicil does not, in republishing, give any quality to a will, that did not belong to it

it previous to its revocation, its operation being merely to set it up again in the same state and condition in which it subsisted from its inception, except as to making it efficient as far as the expression used therein will reach at the time of republication ; a devise, *not properly executed at its inception*, will not be helped by a codicil, although *that* be executed pursuant to the statute of frauds,

Thus, where I. among other things, devised his freehold lands to trustees and their heirs in trust for the maintaining and providing for several poor scholars of Sidney College in Cambridge, and for other charities in his will expressed. The will was all written in his own hand, but had no witnesses. Afterwards I. made a codicil, which was duly executed and subscribed by four witnesses, wherein he recited and took notice of the will. And one question was, Whether the codicil was a good publication of the will within the statute of frauds ? And it was urged, on the part of the devisees, that the codicil, taking notice of the will, and being duly executed, made the will valid in like manner as if it had been affixed to the will at the execution thereof; for, the law annexed it to and construed it as part of the will, and the laying of it in another place signified nothing. But, it was held, that the will was void; for, although there were three subscribing

Attorney Gen.
ral v. Barnes, &
al. Pre.C. 270.
S. C. 2 Vern.
597. 3 Rep.
Chan. 81.
Supra 55, 52.

subscribing witnesses to the codicil, yet that would not support the will, unless it had been *itself* executed pursuant to the statute of frauds.

But, we must be careful to distinguish cases of the above nature, in which there is a will and a codicil *taking effect as distinct instruments*, from the case of an entire instrument made and executed at several times as to several distinct parts of the testator's property, but not attested until the whole is completed; for, in the latter case, the several parts will be considered as one writing making together a will, and the attestation to the latter part will give validity to the former, although that alone relate to land, and there is no real devise in the latter part of the writing. Thus it was held, in the case of *Carleton and Griffin*, that the testator's subscribing the sheet of paper in the presence of three witnesses, and, *then* taking it in his hand and declaring it to be his last will and testament in their presence, and their attesting and subscribing it in his presence and in the presence of each other, was sufficient to give validity to the whole writing *within the statute of frauds*; the latter bequest not being considered by the testator, nor by the Court, *as a codicil*, but, as a memorandum added to his will; and the whole constituting *one entire will* made at different times, and attested agreeable to the statute of frauds,

Carleton v. Griffin.
549. Supra 15,
106, 108.

Lord

Lord Hardwicke was of opinion in the case of *Abney and Miller*, that, if there had been a republication of the will, it would not have altered the case; because the very thing devised itself, viz. the lease, was intirely annihilated and gone by the surrender.

Abney v. Miller, supra 586,
587, 593.
2 Atk. 599.

But this proposition seems to admit of considerable doubt, if taken as applicable to all cases of this nature, though it may be true as applied to the case immediately under his lordship's consideration. We have seen that the effect of a republication is, to give the words used in a will the same operation as they would have had, if the will had been made at the time of the republication, and, consequently, to extend its operation to all property purchased subsequent to the will that is *covered* by the words used therein; "thus if 'the devise be of *all* the testator's lands,'" lands subsequently purchased pass by a republication, because the word "*all*" includes them. Why, then, should not the words "*all* his college leases," if that were the language of the will in the case of *Abney and Miller*, include the leases granted subsequent to the will, *that* being republished by the codicil. There seems to be no reason why the word "*all*" should not extend to the lease taken in lieu of the lease surrendered and thereby adeemed, as well as

to a new lease taken by the testator, to which it would have reached according to the principle of all the foregoing cases. The question in these cases seems not to be what was intended by the testator to pass at the time of the will made, but, what the words will embrace at the time of the republication. It is true that, if a devise be deemed or lapse, as if a man give a specific estate to A. and then sell it, or if a man devise to B. the eldest son of A. and B. die in the life of the testator, a republication will not set up the devise to A. or intitle B.'s representatives to take in lieu of himself; because, in the former case, the testator has not an estate when the will is consummate whereon the words attach, and, in the latter case, the will fails for want of a person to answer the description at the time when it is consummate. But, the case is very different where the devise is in general terms and not confined to particulars; for, then, the only question seems to be, Whether the testator's property quadrates with the words of his will; for, so far as that is the case, the republication will give the will operation.

But, in the case of *Abney and Miller*, the language of the will, as stated by Lord Hardwicke in the case of *Carte and Carte*, was "the leases which I now hold." In which sentence the word "now" arrests the attention of the reader, and

and seems to confine him to *specific leases*, existing at the time when the will was made; or, in another view of the terms used, the word "now" following the term "leases," takes from that term its generality and restrains it to particular leases in being at that time, viz. the time when the will is made; and, so, brings this case within the principle of those where the will, though republished, fails for want of a subject matter on which it may attack, or of a person to take by it. But, such a construction seems extremely strict in a case where the intent of the testator will be evidently defeated thereby; especially as there is another mode of considering the words, equally obvious, by which the devise may be supported; for, if we understand the language as if it were used at the time of the publication, what words more apt can we find to express the testator's intention of giving his renewed leases? Certainly none. Then the case falls within the principle of the cases of *Beckford* and *Parnecott*; and *Perkins* and *Mickletbwaite*, in the former of which it was held that, so far as the words of a will extended, it should, being republished, have operation as if made at the time of the republication; and, in the latter of which cases it was held, that a person of the name of Joseph, unborn at the time of a will made, should take under it, though manifestly alluding, if referred to the time of making the will, to a *deceased* person of the *same* name and description.

OF THE
JURISDICTION OF COURTS
AS TO
DEUSS.

Vide 3 Keb. 30.
54 et 1 Vent.
207. Cro. Car.
396.

THE ecclesiastical courts have no jurisdiction over wills of land only; therefore, if they attempt to proceed in proving them by compulsion, a prohibition lies; but, if no objection be made, they may be proved there.

And, formerly, a prohibition was granted absolutely, where lands and chattels were disposed of by the same will; but, afterwards, it was granted only as to the lands. Now, prohibition does not go as to either; for, where a will is concerning lands and goods, and is one entire will, it shall be proved entirely in the Spiritual Court, to enable the executor to sue for debts which otherwise might be lost, and to expedite the payment of the legacies, which, if it were not so, might be longer delayed, and the will, consequently, unperformed. Besides, as to granting prohibition *quo ad* the land, it is vain; for the probate of the will for the land cannot prejudice the heir, because it is not evidence at common

2 Roll. 375.
1 Sid. 141. et
vid. Cro. Car.
396. Egerton
v. Egerton,
Cro. Ja. 348.
Stroud's case,
2 Keb. 838. 74.
Hudson v
Fisher, Rep.
T. Holt 180.
Camberb. 46.

common law; nor can the examinations of the witnesses there be given in evidence at common law, it being, as to the lands, a proceeding *coram non judice*.

And, where a prohibition was prayed to the Spiritual Court, to stay the probate of a will, which contained a devise of lands and several legacies, suggesting this matter and that the testator was *non compos*, the Marquis of *Winchester's* case was relied upon as in point; but the Court denied that case, and said, that the statute of Hen. VIII. never intended to lessen the jurisdiction of the Ecclesiastical Court as to the probate of wills:

Partridge's case,
Salk. 553.

6 Rep. 23, et
vid. S. L.
Egerton v.
Egerton, Cro.
Ja. 346. S. C.
1 Rol. Rep. 21.

And, where a testator was determined to be *compos mentis* in a suit in the Ecclesiastical Court, and that sentence affirmed in the Court of Delegates; and afterwards, on a trial at law in relation to the real estate devised by the will, the testator was found *non compos*, and thereupon an application was made to the House of Lords by petition, to reverse the sentence in the Court of Delegates, in order to make the determinations uniform; the House of Lords dismissed the petition, because the sentence of the Delegates was decisive, and no appeal lay from it.

Maxwell v.
Lord Montague, cited
3 Atk. 546.

Y y

And

Anony.
Skinner 174.

And if a will contain lands to the value of one hundred thousand pounds, yet the Ecclesiastical Court may cite the parties to bring in the original to be proved *per testes*, and the Court of King's Bench ought not to prohibit them.

Denn's case,
Cro. Car. 114.

But, where a prohibition was prayed, because there was a suit in the Delegates to have administration *cum testamento annexo* of goods and lands of T. D. whose brother and heir the plaintiff was ; wherein it was surmised, that T. D. made his will of the goods and lands, and devised divers legacies, and made his wife executrix, and devised unto her the residue of all his goods, his debts and legacies being paid, and died ; and that his wife, surviving him, died before probate or any election made, and without any will ; and that the brothers and sisters of the wife contended in the Spiritual Court for the administration of those goods of his brother's, pretending that this will was revoked, and that he, alledging the contrary, sued to have administration committed unto him *cum testamento annexo* ; and that the question was, Whether the will was revoked ? It being concerning both lands and goods, a prohibition was granted ; for it was said, that if he should be permitted to proceed in the Spiritual Court, they would allow that will which was pretended to be revoked ; and

where the issue was, whether a will made of lands and goods were revoked, it was properly triable at the common law: but, if the issue were, whether a will of goods only was revoked, it was properly triable in the Spiritual Court; for, they having conusance of the principal matter, shall try also the accessories.

It appears that, in the preceding case, it was prayed, that a prohibition should be granted, which should extend *quo ad* the lands and not *quo ad* the goods, but that was denied; because it must be granted generally for both: for, it was said, that when it was an entire will of lands and goods, and the allegation was to revoke it entirely, it should not be disjoined in the prohibition; but that if one made several wills, one of his land, and another of his goods, and revocation was alledged of both, there, a prohibition should be granted for the one and denied for the other.

Ibid.

A court of equity will not set a will aside upon a suggestion of fraud and imposition *in making the will*; because, if a testator be imposed upon in the making of his will, then it is not his will, and that is a question of fact; and, if the will relate to real estate, a court of law will set it aside on a *devisavit vel non*.

Vid. 1 P. Will.
548. Fenwick
v. James, 2 Fez.
183. Powic v.
Andrews, a
Dom. Proc.
Feb. 6. 1723.
cited 2 Ark.
324. 1 P. Will.
548.

Y y 2

Thus,

James vers.
Greaves,
2 P. Will. 270.

Thus, in the case of *James and Greaves*, Lord Commissioner *Jekyl* said, that there was a difference between a deed and a will, gained from a weak man and upon misrepresentation or fraud; for, if a will were gained from a weak man, and by false representation, this was not a sufficient reason to set it aside in equity; as was determined, in the case of the Duke of *Newcastle's* will, between Lord *Tbanet* and Lord *Clare*, and in the case of *Bodvil and Roberts*. But a deed, so procured, ought to be set aside in equity.

Bennet vers.
Wade,
2 Atk. 324.

So Lord *Hardwicke*, in the case of *Bennet and Wade*, said, that, so far as the bill sought to set aside the will there in question, it was improper; for, the Court could not make a decree of that kind, but only direct an issue *devisavit vel non.*

Webb vers.
Claverden,
ibid. 424.

And, in the case of *Webb and Claverden*, which arose on a bill brought by the heir at law, charging fraud and circumvention in obtaining a will; Lord *Hardwicke* said, that the Court would not determine a fraud in procuring a will, without directing a trial at law, which was done accordingly.

Gofs v. Tracy,
1 P. Will. 288.
Webb. v.
Claverden,
2 Atk. 424.

So, where A. by his will had devised his land to his mother in fee, and the mother was afterwards told

told by J. S. that this will would not be good, but ought to be guarded (as he called it) and that he would make another will for the testator, which he would take care should be *sufficiently guarded*; and, accordingly, J. S. drew *another will*, which was so drawn, that A. thereby gave the land to his mother for *life only*, remainder to J. S. in fee. The mother, on the death of A. brought a bill to establish the first will, and there were divers witnesses examined to prove A. the first testator *non compos* when he made his second will. But, as to the evidence of the testator's being *non compos*, Lord Cowper said, that was entirely a question at law, and to be tried there.

Again, where a bill was brought to set aside a will for fraud, on suggestion that the testator was incapable of making it, by being perpetually in liquor, and particularly when he executed the will. And the defendant pleaded that the will was duly executed, and that it ought to prevail, till, upon an issue at law, it should be found to be otherwise. *Per Curiam*, the plea must be allowed; for you cannot in this court set aside a will for fraud.

Anony. 3 Auk,
17.

And this point seems to have been fully settled, in the case of *Bransby* vers. *Kerridge*, on appeal to the House of Lords, from a decree of

Y y 3

Lord

*Bransby v.
Kerridge,*
1 Eq. Ca. Abr.
406. c. 4
2 Eq. Ca. Abr.
421. 4.
3 Brown. Ca.
Par. 358.

Lord *Maclesfield's*. In that case, the testator had, at different times, made three wills, two of them were made in favour of his father, the third in favour of another person, upon trust and confidence to pay the testator's debts. This will was drawn pursuant to the testator's own directions, twice read over to him before it was executed, and then deliberately executed by him, he declaring he was well satisfied therewith. But the bill charged that it was gained by fraud and imposition, and ought to be set aside and cancelled. To support which charge, the depositions of witnesses were read to prove, that the testator, by his last will, meant no other alteration of the former one (viz. the second) except as to the payment of his debts, and a particular legacy. That when the will was read to the testator, it was read as if the real estate had been thereby devised to the plaintiff (the father.) This evidence was contradicted by the depositions on the other side. It was therefore insisted, that if there were any doubt, it ought to be tried at law, the frauds alledged by the plaintiff being such, as made it appear not to be the testator's will. But Lord *Maclesfield* declared, that there appeared to be great fraud and imposition used in obtaining the will, and that the devisee ought not to take any benefit thereby ; and decreed the devisee to be a trustee for the plaintiff, and the heirs

heirs at law to join with him in conveying the estates devised to the plaintiff, his heirs, and assigns for ever, subject to the debts and legacies. But, on appeal to the House of Lords, it was ordered, that this decree should be reversed, and that the bill should be dismissed.

Indeed, in the case of *Welby and Thornagh, Wright, Lord Keeper*, is reported to have been clearly of opinion, that a will, as well as a deed, might be set aside, in equity, for fraud and circumvention. However, no such thing was made out in that case; but the heir insisting upon it, it was directed to an issue *devirisuit vel non.*

So, whether a testator be *compos mentis* or not, is a question of fact to be tried at law.

Welby v. Thornagh et al. et c cont. Pre. Ch. 123. et vid. Herbert v. Lowns, 1 Ch. Rep. 12. et Maundy v. Maundy, ibid. 66.

Maxwell v. Lord Montague, cited 3 Atk. 544, et supra 689.

The principle upon which these decisions turn is, that if a will be obtained by fraud or imposition upon a testator, or falsely read to him, or made only upon a condition, it is not *his* will in point of law; and that, therefore, those points are proper to be tried by a jury *on ejectment*, or, at least, that the Court of Chancery ought not to make any determination in prejudice of a will, before the validity of it has been determined upon a trial at law.

Y y 4

But

Vid. Lord Huns-
don's case,
Hob. 109.

But there is a material *distinction* between a court of equity taking upon itself to set aside a will on account of fraud, &c. in obtaining or making that will; and, its taking from the party the benefit of a will, which he has procured to be made on a confidence that binds the conscience of the devisee, the breach of which confidence is considered in equity as fraudulent: for this is a ground of jurisdiction in courts of equity, distinct from that over the will itself, the existence of which is not, in such case, controverted by the court, as it would be, were they to decide upon questions of fraud, sanity, forgery, or the like, in either of which cases, it is no will. For, in the former case, equity does not set aside the will, but decrees the devisee to hold for the benefit of the party aggrieved by his breach of confidence, on the general ground of laying hold of the ill conscience of the party, to make him do what is necessary to put matters into the situation, in which they were intended by the testator to stand, had it not been for the fraudulent practice of the devisee.

Case put per
Chan. P. Will.
283. et s. L.
2 Vern. 699,
700.

Thus if A. agree to give B. bank bills to the amount of 1,000*l.* in consideration that B. makes his will, and, thereby, devises his lands to A. and accordingly B. makes such a will, and A. gives B. the bank bills, but they

prove to be forged; this, though a good devise at law, will nevertheless be avoided in equity by the testator's heir for the fraud.

So, in the before mentioned case of *Goss and Tracy*, the Lord Chancellor said, that, if A. had devised his lands to his mother in fee, and, afterwards, J. S. had told *A. the testator*, and, *not the mother*, that the will was a void will for want of its being well guarded, and that he would make another will for the testator that should be effectually guarded; and accordingly he had made another will, for the testator, whereby the estate had been devised to the mother *for life only*, the remainder to J. S. in fee; this, though a good will, in law, if attested pursuant to the act of parliament, would be set aside in equity for the fraud.

Ibid, et note
distinction be-
tween this case
and the case of
Goss v. Tracy
1 P. Will. 288.
2 Vern. 699,
700.

And, in *Chamberlain's* case, where an eldest son (his father being about to make his will, and thereby to make certain provision for his younger children) persuaded him not to make any such will, for that he would take care his brothers and sisters should have those provisions; whereupon the father forebore to make the provisions: they were decreed, in Chancery, to be made by the heir.

Chamberlain's
case, cited
Pre. Ch. 4

So

So where J. S. being a copyholder of a manor, and having a great affection for D. who was his godson, and intending to leave the greatest part of his copyhold to him, and the rest to his wife, when he was sick was advising with some of the copyholders of the manor how this might best be done, and whether it were not best to nominate D. his successor, with exception of such part to his wife as he intended for her. The wife, being then present, pretended this might be prejudicial to her as to the part intended her, and engaged that, if he would nominate her his successor, she would take care D. should have such part of the land as was intended him, and offered to give security for that purpose: whereupon J. S. nominated his wife successor, and died. She refusing to let D. enjoy the lands intended him, he brought a bill to have them decreed to him. The wife pleaded the statute of frauds and perjuries, and that there was no memorandum in writing. But the Court were of opinion with D. and decreed in his favour, not on the ground of its being an agreement or a trust, *but as a fraud.*

So, if a man, having made his will, and his son executor, had said, when he was dying, that he had a mind to have his wife executrix, and the

the son had said, Don't trouble yourself to alter the will, for I will let her have the surplus and act as executrix : the Court of Chancery would decree it accordingly.

And, in the case of *Coventry and Carew*, where an estate was given to be exchanged with a college, and the college would not exchange ; the heir at law insisted, that, as the devise could not take effect, it was lapsed. But the Court of Chancery decreed that, as the devisee could not have the thing designed, he should have the thing given in lieu.

*Coventry vers.
Carew, cited
2 Vez. 564.*

Where the question arises simply upon the words of a will, it is in general a proper subject for the decision of the common law only ; but, in some cases, it may be a subject for the decision of common law or equity indifferently, in respect of the assistance which a court of equity gives to come at the proper trial. For, where any equitable circumstance lays the foundation of an application to Chancery, that court may, though a title depend upon the words of a will only, determine upon it as well as a judge or jury. But, notwithstanding that, Lord Hardwicke said, in a case so circumstanced, that if either party had a mind to go to law, subject to the directions which had been given in a former decree,

*Tanner vers.
Wise, 3 P.Wms.
296.*

decree, he would not hinder them ; but, if both parties were desirous to have his opinion touching the title, he would give it.

Tanner vers.
Wise, 3 P. Will.
296.

Where an issue is directed out of Chancery on a *devisavit vel non*, that court takes upon itself to mould the evidence, and direct the application of it, so as not to impede the fair discussion of the question. Thus, where a bill was brought by the heir at law of a testator, suggesting, that the testator's widow had all the writings and title-deeds relating to the inheritance of the lands of which the testator died seised, and that those writings belonged to the heir, who was intitled to the lands ; the defendant, the widow, by her answer insisted, that all the real estate of the testator was by the said will devised to her in fee-simple. This cause was brought on to a hearing before the Lord Chancellor King, who decreed, that, as the plaintiff was the testator's heir at law, all deeds and writings relating to any part of the testator's estate should be brought before the Master for the plaintiff to have the inspection thereof, who should be at liberty to bring an ejectment ; and that the defendant, who claimed under the will, should not give in evidence any dormant term or incumbrance. Afterwards, on a re-hearing, Lord Hardwicke approved this decree, though it seemed but a slight

sight equity for the heir to say he wanted writings, when his title as heir stood in need of no writings, unless he claimed under some deed of intail concealed by the widow or executor.

So, where a plaintiff claimed lands by a will which was proved, but the original was taken out of the Prerogative Office, so that the plaintiff could have no remedy at law, and, therefore, prayed the aid of the Court of Chancery ; it was decreed, that the copy of the probate of the will, out of the Register's book in the Prerogative Office, should be admitted in evidence at law, at any trial that should be had concerning the title of the said lands, as the true original will.

Gorges vrs.
Foster, Nel-
son's Rep. Ch.
82.

O F

GIVING A WILL

I N

P R O D U C T L A W.

Evans vers.
Herbert, 2
Keb. 35. 71.
vid. 1 Keb. 117.
23. Comb. 395.
et vid. Eden
vid. Chalkil,
2 Keb. 117. 23.

THE best proof of a will is the production of the instrument, if that can be had : therefore, where, in evidence to a jury at bar in ejectment, the defendant made title as a purchaser under a devisee, and shewed only a bill in Chancery preferred by the heir, under whom the lessor of the plaintiff claimed, against the devisee, whereby the will was set forth, and also the answer in which it was confessed : It was held, per *Keeling* and *Moreton*, contrary to *Twisden*, that this was no evidence, though they proved a possession according to the devise, and that this had been confessed by the plaintiff in former trials ; because there is no necessity for such proof when the will itself can be had, and is the best evidence of its own existence.

Comb. 46.

Therefore a will, exemplified under the great seal, is not evidence to a jury in ejectment.

Neither

Neither is the probate of a will in the spiritual court evidence to make a title to lands by devise ; because all their proceedings, so far as they relate to lands, are *coram non judice*, for they have no power to authenticate any such devise : and therefore a copy produced under the seal of that court, is no evidence of a true copy.

And the probate of a will of land is not (upon the same principle) evidence, even where the will is lost.

Thus, where a will was proved in 1666, in the archdeacon's court of London, and the office was burned in the fire of London soon after, and the probate was produced in evidence to prove the will under these circumstances ; it was rejected by *Holt*, Chief Justice, as not good evidence ; the reason his Lordship gave was, because the probate is signed by the register only upon the attestation of the proctor, and the examination of him, six months being allowed to register it.

So, where, on an ejectment at the assizes, the copy of the registry of a will was produced in evidence to prove a pedigree, and not to derive any title by the will, and also the probate of the same will was offered for the same purpose,

Holt,

Dike v. Pophill,
1 L. Raym.
714. vid. S.C.
Gilb. Law
Evid. 72, 73.

Holt, Chief Justice, refused to admit them ; for, as to the probate, it was only evidence as to chattels, and, although there was the same reason to admit the copy of the register to be evidence as the copy of court rolls, or of a register of a church, because the original would have been read as a roll of the court without further attestation ; yet the practice had been always otherwise, which he would not subvert, though founded on a mistake that the ledger book is read as a copy, and so the copy of *that* is but the copy of a copy, whereas the ledger book is read as a roll of the Prerogative Court. And then, he said, the copy of the register not being evidence to prove the will, when the original was in being, it could not prove the pedigree ; because that depended upon the credit of its being a will, which was not proved by the copy of the register.

Ibid.

But, afterwards, on the same circuit, on an issue directed out of Chancery to try, in a feigned action, the question, Whether “*beir or not* ;” the same probate was offered to Baron *Tracy* to prove the pedigree, and he admitted it, notwithstanding the above case was cited to have been ruled as aforesaid ; because, he said, the other case was in ejectment, and this only in case, and he could not know that the title of the land would come in question.

The

The reporter observes, that there is no difference between the two preceding cases; because the title to the land was not derived by the will to the lessor of the plaintiff in the ejectment.

Ibid.

But, it seems that the register book itself would be good evidence in such a case to prove a will of personal estate; because it is not considered merely as a copy, but is the roll of the court itself; and therefore, where the will was only to prove a relation between the father and son by the father's will, the rolls of the Spiritual Court (that has authority to enrol all wills) was held to be sufficient proof of the existence of such testament; and, if there be such a will, as appears by the rolls of that court, the relation is proved.

Polhill and Polhill. Gilb. Law Evid. 72, last edit. et vid. 1 L. Raym. 732. et S. L. per Holt in Legar, vers. Adams, 1 L. Raym. 731.

But the law will not allow these rolls to prove a devise of land, where the claim is by the words of the devise; for, to that purpose, the ecclesiastical courts have no power to authenticate the will.

Ibid.

But, where the parties contesting have neither of them any right to the possession of the will, a copy will be admitted as evidence.

Thus, where the dispute was between the lord of the manor, and the devisee of a copyhold of

1 L. Raym. 735.

the same manor ; it was ruled by *Holt*, Chief Justice, that the recital of the will, in the copy of the admittance, was good evidence of the devise against the lord or any other stranger : but that, if the suit had been between the heir of the copyholder and the devisee, the will itself ought to have been produced.

Anon. Ca. T.
Holt, 298. 25.

So, where, in an avowry for a rent-charge devised to the plaintiff, he could not produce the will, for that belonged to the devisee of the lands charged, who claimed them thereby ; he produced the ordinary's register of it, and proved former payments, and that was held sufficient evidence.

But the probate of a will of lands, accompanied with other circumstantial proofs, was considered by *Holt*, Chief Justice, as good evidence, *where the will was proved to have been lost.*

St. Legar verf.
Adams, 1 L.
Raym. 731. vid.
Skinner 174.

Thus where, in an ejectment, it appeared upon the evidence that a will was made of the lands in question in 1647, which will was lost, but mention was made of it in the calendar (which is the index of the register of the Spiritual Court) and also in the seal book. A commission issued in April 1648, to examine the executors upon their oaths, &c. and, that being returned, probate was granted in May 1648, which probate was produced

duced in evidence ; *Holt*, Chief Justice, allowed it at the assizes to be good proof of the will, but, he reserved it for his further consideration. And afterwards, as well in the King's Bench as at *Nisi Prius* upon other trials, declared, that he held it to be good evidence, and that he continued of his former opinion.

And, where a will remains in Chancery by order of that court, a copy may be given in evidence ; for, then it becomes a roll of that court, and, by consequence, a copy of it sufficient evidence.

Gilb. Law of
Evid. 74.

But the authority cited in support of the above proposition (viz. *Keb.* 40 *et* 117.) does not warrant it to the extent that *Gilbert* has stated it ; for, in *Keb.* 40, there is no case of that kind, and *Keb.* 117, puts it thus, “ *if it had been only a circumstance, and as inducement, and the will remained in Chancery, or other court by special order of such court.*”

However, it seems that where the court in which the will is lodged, has jurisdiction over the subject-matter of it, the copy may be read for any purpose ; upon the principle that the will is become a roll of the court, and might itself be read without further attestation.

But, where proof of the attestation is required, that stands upon the old common law principles; therefore, in such case, the will must be proved by a subscribing witness, if either of them be living; for, it is a general common law rule, that where a witness has subscribed an instrument, he must be always produced, because his is the best evidence respecting it.

Longford *vers.*
Eyre, 1 Will.
741.

As the statute has not directed the will to be proved by three credible witnesses, it has been held that one witness is sufficient to prove what all the rest have attested. And the proper way of examining a witness to prove a devise as to lands, is, that the witness should not only prove the executing the will by the testator, and his own subscribing it in the presence of the testator, but likewise, that the rest of the witnesses subscribed their names in the presence of the testator; and then one witness proves the full execution of a will, since he proves that the testator executed it, and also that the three witnesses subscribed it in his presence. And upon such examination of one witness the will may be read.

Holdfast on
Dem. Anstey
vers. Dowsing,
2 Strange 1254,
supra.

But, although a will may be read on proof of all the circumstances by one witness, yet that proceeds upon a supposition, that there are two others who are capable of giving, if called upon, the same testimony.

It

It is not necessary that all the witnesses should prove the fact attested; for, it was ruled per *Holt*, Chief Justice, at a trial at bar, that, if there were three subscribing witnesses to a will, this was sufficient within the statute of frauds and perjuries, though, upon the trial, one of them would not swear that he saw the testator seal and publish his will; for, otherwise, it would be in the power of a third person to defeat the will of the deceased; and, therefore, if it was proved to be his hand, and that he set it as a witness to the will, his lordship held that sufficient.

Dagney vers.
Glaffcock,
Skinner 413.
S. C. Ca. T.
Holt 742.

And, the attesting witnesses may, upon examination, deny the facts, which, upon the face of the instrument, they are presumed to have attested; but such denial will be received with great jealousy, and the Court will support the will, unless the evidence denying the facts be *very* satisfactory and clear,

Thus, in a trial at bar upon a devise, where, on one side, two of the witnesses swore that the devisor did not publish the instrument as his will, but that another guided his hand, and that the testator made his mark but said nothing, nor was capable of saying any thing. And, on the other side, it was proved, that the testator had made two former wills, and in them had devised his land in like manner as by this will, and that

Hudson's case,
Skinner 79.

he died of a consumption and was sensible to the last, and that three days after making his last will he was sensible and able to discourse, and so continued until within six days of his death. Hereupon it was contended, that it appeared that the witnesses had been dealt with. In reply to which the counsel on the other side urged, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so it would be no will within the statute. But *Pemberton*, Chief Justice, said, that it was not probable that a person in his senses (as they were not able to disprove the testator to have been) would suffer another to guide his hand to a writing, and not say any thing ; and that, therefore, the Court took it that he did publish it. And the Court committed the witnesses, and took security of the plaintiff to prosecute them for perjury.

Digges's case.

And, in the last-mentioned case, *Pemberton*, Chief Justice, cited *Digges's case*, where a scrivener wrote the will, and two other persons with him were witnesses : the scrivener swore, that the testator was *compos*, and the two others swore that he was *not compos*. But the verdict found the will a good will ; and the two witnesses were committed to the Fleet.

And

And evidence may be produced on the part of the devisee, to contradict the testimony of the subscribing witnesses, as was done by Lord Chief Justice *Pratt*, in the case of *Pike and Badmering*, in the court of King's Bench.

Cited Strange
1096.

So, in the case of *Lowe and Jolliffe*, which was a trial at bar on an issue out of Chancery, concerning lands in *Worcestershire*, three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, and a dozen servants to the testator swore that he was utterly incapable, at the time of making the supposed will or codicil and at any intermediate time, of making a will, or transacting any other business. To encounter which evidence, the counsel for the devisee examined several nobility and gentry of the county, who were with the devisor the day the devise was made, two physicians who occasionally attended him, and several other material witnesses, who all strongly deposed to the sanity of the devisor. The Jury, after a trial of fifteen hours, brought in a verdict to establish the will and codicil against the testimony of the subscribing witnesses.

*Lowe vers. Jolliffe, Blackst.
Rep. 365.*

But where, on an ejectment brought upon a will, a woman had sworn against her own attestation,

Goodtitle vers.
Clayton, 4
Burr. 2224.

Vid. Digger's
case, supra
710.

Mr. Justice *Yates* said, that she ought not to have been admitted to have given this evidence. And Lord *Mansfield* observed, that this would not invalidate the will; for there were cases where one witness had supported a will, by swearing *that* which the other two witnesses attested, although those two had denied that they did so. And, in the principal case, a new trial was granted, the verdict having been given against the devisee apparently upon this ground.

Gilb. Rep. Eq.
264

The testimony of the witnesses attesting, as to the state of mind in which a testator was at the time when they were called upon to attest, is not uncontrollable; for, the heir at law, who is to be disinherited, may examine other testimony against it.

But, a court of equity will not direct an issue to try the sanity of a testator, where the witnesses attest that he was sane, upon a mere suggestion to the contrary on the part of the heir, unsupported by any positive proof.

Tucker vers.
Phipps, 3 Atk.
359.

Thus, where a bill was brought, suggesting, among other things, that the defendant had destroyed or concealed the will, and the defendant put in three answers, and, in the first, made no mention of the insanity of the testator; but, in
the

the third answer, denied he had ever made any such will, but said, if there ever was any such, he could not say whether his father was, at the time of making such will, of sound mind ; Lord *Hardwicke* said, that, as to the insanity, the defendant's proof spoke in general terms only to the testator's being in a weak condition ; but compare this with the plaintiff's evidence, and the manner of the defendant's introducing the insanity in his answer, and the acts he had done under the will. The insanity was not mentioned until the third answer, and then very tenderly. The plaintiff's proofs were very positive as to the sanity of the testator ; they were the depositions of the three subscribing witnesses, whose testimony was by no means impeached. The will was a reasonable one, not made in secret, but several persons were present. The defendant had brought actions, and sworn himself surviving executor, and had acted several years under the will without ever making any pretence of insanity in the testator. And his lordship was of opinion, that under the circumstances of this case, it was not proper to direct a trial at law as to the sanity or insanity of the testator.

O P

P R O V I N G

A W I L L

I N

C H A N C E R Y.

IT is usual where a title depends upon a will, to prove it in Chancery against the heir, particularly if the will be of modern date.

But, unless the heir be forth-coming, a court of equity will not declare a will well proved; and therefore, where a bill was brought by a residuary legatee for sale of a real estate pursuant to the testator's will, and that the residue, after payment of debts, might be paid to the plaintiff, and the bill suggested that no heir at law could be found, which was admitted by the answer: the Lord Chancellor directed a sale of the real estate, but said he could not declare the will well proved, there being no heir at law.

French vers.
Baron, 2 Atk.
120.

But

But Lord King, in the case of *Colton and Wilson*, thought such proof not absolutely necessary to make out a title, any more than it would be to prove a deed, by which the estate was settled from the heir at law after the ancestor's death, in equity. A will prevented and broke the descent to the heir, as much as a deed, and the hands of the witnesses to a will might be as well proved as those of witnesses to a deed. And he said, that as it would be no objection to a title if a modern deed, on which the title depended, were not proved in equity, why should it be so in case of a will, where the same appeared to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator.

Per Chan. 3 P.
Will. 192.

However, the facts of the case of *Colton and Wilson* abovementioned, do not fully warrant us in concluding that the want of such proof would not be a ground of objection to a title in equity; because, in that case, there were circumstances which made it an exception from such general rule if it subsisted. The facts in that case were these: W. a counsel of note at *Leeds* in *Yorkshire*, had articled to purchase an estate, part of the estate of T. who had no issue, but had two brothers G. T. and H. T.—T. having mortgaged the estate for a considerable sum, amount-

Colton v. Wilson, 3 P. Will,
191.

ing

ing to *near* as much as the purchase-money, and, owing other debts, made his will, thereby devising all his real estate to his youngest brother H. T. and his brother-in-law R. and their heirs, in trust to sell, and pay his debts and legacies, and what remained, after debts and legacies, he gave to his next brother and heir G. T. who was beyond sea, in the service of the East India Company. Soon after the testator died H. T. the testator's youngest brother, and one of the trustees in the will, alone, covenanted, by articles with W. to sell part of the trust estate and to convey the same to W. at his request, and W. covenanted to pay interest for the purchase money from the Lady-day ensuing. Then the creditors of the testator T. brought their bill against W. to compel him to complete his purchase, and to pay his purchase-money, to the end they might be satisfied their debts. On the part of W. who wished to be off his bargain, it was insisted that, this being the case of a will not proved in equity against the heir, it was a defective title; that none of the depositions of the witnesses, that had been examined for the will, could be read against the heir, who, in this case, was probably adverse and offended by the will: or else it might be reasonably presumed that he would, though beyond sea, have been prevailed upon to put in his answer to the bill; but that

the

the heir might watch for an opportunity till the witnesses to the will should be dead, when he would contest the will : and that, though W. had said in his answer that he was willing to proceed in the purchase, yet it was upon terms, that all proper parties should join, one of which proper parties was the heir at law ; and that it would be a difficulty on the Court to compel an unwilling purchaser to accept of a purchase, if there were any colour of objection to the title. But, *per Curiam*, it appears that W. who articedled for the purchase, knew at that time that the heir was beyond sea, and yet accepted the title, without insisting that the heir should join, or that the will should be proved against him. Also W. admitted by his answer that the will was duly executed, and, by entering upon great part of the estate, had himself executed the purchase ; for which reason let him pay the rest of the purchase-money, with interest, according to the articles, and at the same time let the trustees and mortgagees join in proper conveyances.

But, in the preceding case, the reporter observes, that it was a great help to the title, that the mortgage, made by the testator, and prior to the will, which was to be kept on foot for the protection of the title, was for the greatest part of the purchase-money. And, yet, notwithstanding

ing all these circumstances, W. was on the first decree discharged from his purchase, and the above decree was made on a rehearing.

Webb v. Litcot,
3 Atk. 27.

And, if the heir make default, the Court must read to proof before it can declare the will well proved. Thus, where a bill was brought against several persons and the heir at law to establish a will, and the heir at law made default; Lord *Hardwicke* said, that he had some doubt whether he ought not to hear proofs of the will's being duly proved *before he could declare it well proved*, notwithstanding *the heir* had made default; though, in common cases, the plaintiffs were entitled to a decree according to the prayer of their bill, without reading any evidence; and though the Register could not recollect any case where this was the practice of the Court, his lordship, thinking it necessary, ordered the proofs to be read.

It is an invariable practice of the Court of Chancery, established by Lord *Talbot*, never to decree a will proved unless all the witnesses are examined; because if, after the decree, the heir were to controvert it, the Court would order an injunction; and, therefore, he has a right to proof of sanity from every one of them, whom the statute of frauds has placed about his ancestor.

Thus,

Thus, on a bill preferred by the legatees under the will of J. T. against the heir at law of the testator, who was an infant, in order to have his real estate sold for payment of their legacies which were charged thereupon, and to have the will established. There were three witnesses to the will, *all* then living, but only *one* had been examined, who proved the execution of it, and the attestation of the other *two witnesses*: And his Honour refused to establish the will without the examination of all the witnesses; for he said it was a *rule* that all the witnesses, if living, must be examined to prove the *will*; besides the heir at law was, in this case, an *infant*, who, if of age, had a right to cross-examine all the witnesses; and as no admission of this sort could be received for an infant, the Court must protect his right, and therefore must insist upon all those requisites which he would have had a right to insist upon had he been of age, and capable of making a defence for himself.

Townsend v.
Ives, 1 Will.
216. et Ogle v.
Cook, 1 Vez.
177.

And the rule is the same, in equity, although one of the witnesses be beyond sea; for the same credit is not to be given to the hand-writing of a witness that is so circumstanced as would be given to it if he were dead; because it is not necessary to presume, that it is out of the power of the parties interested to get at him if they please.

Grayson vers.
Atkinson,
2 Vez. 459. et
vid S. L. Fre-
derick vers.
Aynscomb,
1 Atk. 627. et
vid. Skinner
174

This objection was taken in the case of *Grayson* and *Atkinson*, where one of the witnesses to a will being beyond sea, the other two proved all the solemnities except the signing; but, though they swore that the testator acknowledged his hand to them at different times, yet, they did not swear he acknowledged it to the third witness, who was abroad, nor was there any proof about him. *Et per Curiam*, it not being proved that the testator published his will in the presence of the third witness, but only of those examined, and that the other witness subscribed in their presence, it stands on the proof of the attestation. If the witness was dead, it might possibly be sufficient; that is the act of God, and therefore the Court gives credit to his hand-writing; but here a bill is brought to establish the will by a decree, and it is only proved that the witness is beyond sea. The question then is, Whether the proof is not defective, and whether to establish this there ought not to be some proof that the act was done which this witness has attested? because a commission may be had to examine the witness beyond sea; for, in this Court, suitors are not under the difficulty they are under in a court of law, where the proof must be *viva voce*. There is no such rule of law as exempts parties from the necessity of proving the facts materially, although they are exempted from the necessity of bringing that

that witness before the Court. All that can be done at present is to direct a trial at law.

Upon a bill to establish a will, it was objected for the defendant, the heir at law, that the will was not proved; and that the answer only stated a belief that a will was made, but did not directly admit it, and was not replied to; and the Master of the Rolls said, though it was generally true, that what the defendant believed, the Court would believe, yet there was no precedent where the Court had decreed the establishment of a will not proved, or admitted by the heir at law.

Potter v. Potter,
1 Vez. 274.

Before the year 1718, the method on commissions to prove a will was to deliver out the will of land upon security. Afterwards the Registers refused to deliver out the will, insisting upon being paid for attending with it, and where it was wanted at a distance their demands ran very high. But on a bill brought in 1734 by creditors and legatees, who were not likely to suppress the will, one of the witnesses residing at a distance, an order was made by the Court of Chancery, on producing three precedents, that it should be delivered out on security.

Morse v. Roach,
et al. 2 Strange
961.

And Lord *Mallesfield*, on a motion of this kind, made an order upon the Prerogative Court

Vid. 1 Atk. 627.

to deliver a will to the Register's Office in Symmonds-Inn, to lie there till the Court of Chancery should have done with it.

*Frederick v.
Aynscombe,
2 Atk. 627.*

So Lord *Hardwicke*, on a bill to perpetuate the testimony of witnesses to a will, one of whom resided at *Bullogne*, directed a commission to be executed there to examine the witness; and, it being necessary to have the will at the execution of the commission, and application having been made at the Prerogative Office to deliver out the original will to be proved at *Bullogne*, and the Register of that Court refusing to deliver it upon any security whatever for the return of it, insisting on sending a messenger of their own, which would put the defendant to considerable expence; his lordship, it appearing that the defendant was the only devisee who could claim any real estate under the will, ordered the original will to be delivered out by the proper officer of the Prerogative Court to a fit person to be named by the defendant, in order to be produced at the execution of the commission; such person first giving security to be approved of by the Judge of the Prerogative Court, to return the same in three months from the delivery thereof to him.

Ibid.

And it was also ordered, in the above case, that if there should be any dispute as to the security

curity to be given for the safe custody and return of the will, it should be referred to a Master in Chancery to settle and adjust the same.

But, Lord *Hardwicke* observed, in the fore-going case, that if the defendant had not been the sole devisee of the real estate, but there had been other persons under the will interested in it, and they had refused their consent, he would not have made this order; because, the taking a will out of the kingdom was different from any former cases in that court: they had gone no further than ordering them to different parts of England.

Ibid.

But the Court of King's Bench refused a *mandamus* to the Prerogative Court to deliver out a will of land, leaving the party to detinue, or action on the case, which actions *Twisden*, Justice, remembered to have been brought for that purpose.

Savill's case,
2 Keb. 610.

A bill to perpetuate the testimony of witnesses will not lie by a devisee to prove the will of a lunatic in his life-time; because, such devisee, in the life of the testator, has neither *jus in re* nor *ad rem*; nor has he, at the time of the bill brought, and possibly he never may have, any sort of right; for, the lunatic may recover from his lunacy and make another will.

A a a 2

Thus,

Sackville vers.
Ayleworth,
1 Vern. 105.
1 Eq. Ca. Abr.
234, 3.

Thus, where A. having formerly made a will, and, thereby, devised great part of his estate to S. afterwards became a lunatic, S. exhibited his bill against the presumptive heir of A. to examine witnesses touching the will in *perpetuam rei memoriam*. The defendant demurred, because, it was a bill to prove a man's will in his life-time, and the devisee had no right or title by the will until the testator's death, it being until that time ambulatory and in truth no will. On behalf of the devisee it was insisted, that to examine witnesses in *perpetuam rei memoriam* was a chief part of the original jurisdiction of the Court, it being in all cases a natural equity to have the testimony preserved; and that, in this case, it would be no prejudice to any one; because, if the lunatic should recover his understanding, the will, notwithstanding this examination, would be revocable: and it might be a manifest prejudice to the devisee to deny him the benefit of such examination; for, the lunatic might still live many years, and continuing a lunatic he was incapable of making another will, or of new publishing this, and in that time all the witnesses to the will, that could prove the testator to be then *compos mentis* might be dead. But the bill was dismissed.

Bechinall vers.
Arnold,
1 Vern. 354.

A bill to perpetuate the testimony of witnesses will be dismissed, if preferred against a purchaser without

without notice of the will to be proved. Thus, where the defendant pleaded himself a purchaser without notice of any such will, and insisted that, unless there had been a verdict in affirmation of such will (nothing hindering the plaintiff, but that if he had a title he might recover at law) the plaintiff ought not to be admitted to examine his witnesses, thereby to hang a cloud over a purchaser's estate; upon debate the plea was allowed.

A bill brought by a devisee of land, to perpetuate the testimony of a will and to establish it, was, upon opening thereof, dismissed with costs; the Court declaring, that a cause, only for perpetuating testimony, ought not to have been set down for hearing,

Hall v. Hoddesdon, 2 P. Will. 162.

But, though the bill be dismissed, the plaintiff therein will, at law, have the benefit of these depositions,

Ibid.

Where a devisee brings a bill in *perpetuam rei memoriam*, and the heir does nothing more than cross examine the witnesses, who are produced to confirm the will, he is intitled to his costs.

Berney v. Eyre,
3 Atk. 387.

Berney v. Fyre,
3 Atk. 387.

If the heir examine witnesses to encounter the will, then he shall not have his costs ; that is, where the bill does not pray relief, or is not brought to a hearing.

Ibid.

But, when the cause is brought to a hearing, if the heir at law has an issue directed to try the will, and the will is established, he, as having a right to be satisfied how he is disinherited, shall have his costs.

Ibid.

Yet if the heir at law set up insanity, or any other disability against the devisor, and fail, he shall not have his costs.

But, it must be a very strong case, which will induce the Court to give the costs against him ; as spoliation or secreting the will.

Ibid.

Where an heir, being informed that his ancestor's will was in the hands of a particular person, went, notwithstanding, and took out administration upon the oath usual on those occasions, without ever making any enquiry after the person whom he was informed by letter had the will in his custody ; Lord *Hardwicke* thought this such improper behaviour in the heir, that he would not give him his costs ; though his lordship.

Lordship said, that he would have given costs to him, notwithstanding one witness had sworn positively to an attempt of concealing the will, because, it was as positively denied by the heir's answer.

I N D E X.

A.

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ADVOWSON, in gross, may be devised, 220.

- - - - - is included under the word **Tenement**, 221.

- - - - - - - - - - - **Hereditament**, 221.

- - - - - will not pass by the word "Lands," 221, 222.

Quære, if the devisor has no other thing to answer that description, 222.

- - - - - is not a name by which an appropriation will pass, 223.

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- - - - - of a vicarage, will not pass under the words **Commodities, Emoluments, Profits, and Advantages**, to a prebendary belonging, 226.

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Vide **ESTATE, equitable**.

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- - - - how distinguished from a rent, 229.

APPOINTMENTS by will under powers, are within the statute of frauds, 58.

- - - - - - - - - - - fell originally under the jurisdiction of courts of equity, 162.

- - - - - - - - - - - brought under the jurisdiction of common law courts by the statute of uses, 27 Hen. VIII. 163.

- - - - - - - - - - - take effect out of the original instrument by which the power was created, 163—165.
Vide **DEVISE, FEME COVERT, POWERS**.

- - - - - - - - - - - , as to their external form, and their action upon the estates settled, follow the nature of the instrument by which they are executed, 168.

Therefore, an infant feme covert cannot devise by virtue of a general power to devise, 168—170.

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Vide **ADVOWSON**.

ARTICLES for the sale or settlement of estates, if they can be enforced by a bill for specific performance, will revoke a will previously made, 594, 595.

ATTESTATION, what intended thereby, 68, 69.

- - - - - extends not only to the act of signing, but to the state of the testator's capacity of willing, 69, 70.

- - - - - upon an acknowledgment of the testator's handwriting sufficient, 71—73.

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BILL to perpetuate the testimony of witnesses, will not lie by a devisee to prove the will of a lunatic in his life-time, 723, 724.

Vide **EQUITY**, Court of.

- - - - - will be dismissed if preferred against a purchaser without notice, 724, 725.

- - - - - with costs, if set down for hearing, 725.

But, though the bill be dismissed, yet the plaintiff will have the benefit of the depositions, 725.

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Vide **MORTMAIN**.

BONA et CATELLA *Felonum*, not devisable, 41—45.

Vide **FRANCHISE**.

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C.

CANCELLING or **TEARING**, by a stranger, is no revocation of a will, 612.

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CODICIL or *Codicils*, may be made, altering, &c. a will, 23.

- - - whence derived, and what its office is, 23, 24.

- - - by whom to be made, 24, 25.

- - - made under the Statutes Hen. VIII. must be in writing, 25.

Vide **SUBSCRIPTION**.

- - - inconsistent with a preceding will, is a revocation of it, 541—543.

Distinction between a codicil and a second will as revoking instruments, 543—545.

Vide **REVOCATION**, **REPUBLICATION**.

COMMONS. *Sans number*, not devisable, 41.

COMPOS MENTIS or not, a question of law to be tried by jury, not inquirable in courts of equity, 695.

CONDITIONAL LIMITATION, its nature, and in what instances it occurs, 256—261.

- - - - - is the result of a construction of a devise adopted to give effect to the intention of a testator, 257.

Vide **CONDITION**.

- - - - - good to introduce an executory or springing use after a fee, 262—264.

CONDITION of *re-entry*, not devisable, 46—234.

CONDITIONS, in wills, may be either precedent or subsequent, 246.

Instances of both sorts of conditions, 246—248.

- - - - - though created by *express* words of condition, take effect as conditional limitations, where such construction necessary to effect the objects of devisors, 261, 262.

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- - - - - descend to heir at common law, 263.

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CONTINGENT INTERESTS or ESTATES, are devisable within the statutes 31st and 34th Hen. VIII. 34. 233, 234.

- - - - - their nature and kinds, 250.

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CONVEYANCE for the purpose of a security to creditors, is a revocation **PRO TANTO** only of a will, 619—623.

COPYHOLD ESTATES not devisable within the statute of wills, 45.

- - - - - devised, take effect under surrender, by virtue of the devise, as a declaration of the uses thereof, 45, 46.

- - - - - whether legal or equitable, not affected by statute of frauds, 53—55.

Vide **SURRENDER**.

COPY of a will, is good evidence to prove its existence between parties, where neither of them have any right to the possession of the will itself, 705, 706.

- - - - - remaining in Chancery by order of the Court, may be given in evidence, 707.

So in all cases where the Court in which the will is lodged, have jurisdiction over the subject matter of it, 707.

CORRODIES, not devisable, 41.

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COVENANT, upon a marriage to make a feoffment, no revocation of a will made previous, 593.

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Vide **JURISDICTION of Courts, ECCLESIASTICAL COURTS, and EQUITY, Court of.**

COURT of CHANCERY.

Vide **EQUITY, Court of.**

COURT of EQUITY.

Vide **EQUITY, Court of.**

COVERTURE is a disqualification to devise arising from want of power or free agency, 146, 147.

Custom for a feme covert to devise not good, 148.

- - - - - no disqualification if the husband banished, 148, 149.

Vide **FEME COVERT**.

- - - - - creates no disability in a woman to be a devisee, 315.

And, if her husband refused, equity would relieve her, *ibid.*

D.

DEVISE, existed among the Saxons, 1.

But was required to be confirmed by the heir at law, 2.

- - - put a stop to by the introduction of feuds, *ibid.*

Exceptions in cases of local customs, 3.

In which cases the whole of such lands, though granted to hold by knights service, were devisable in like manner as at common law, *ibid.*

Distinction, in London, between citizens resident or not so, *ibid.*

I N D E X.

DEVISE might be set up by custom in boroughs, 4.

- - - - not permitted till long after other modes of alienation were intruded on the feudal system, 6, 7.

- - - - practised through the medium of uses, 7, 8.

But checked by the 27 Hen. VIII. for transferring uses into possession, 8, 9.

- - - - sanctioned by 31 and 34 Hen. VIII. 9.

- - - - further regulated by stat. 29 Car. II. 9.

- - - - under the stat. of 31 and 34 Hen. VIII. considered and analized, 11.

- - - - how far treated upon in the present essay, 11.

- - - - under stat. 31 and 34 Hen. VIII. described, 12.

- - - - - - - - - - - - requires no particular form of words, 13.

- - - - made in the form of indentures, 13, 14.

- - - - delivered as a deed, yet good as a devise, 14, 15.

- - - - may be on several sheets of paper, 15.

Not fixed together, *ibid.*

Found at different places before the statute of frauds, 15.

Made at several times, at any distance from each other, *ibid.*

- - - - by several memorandums, 15, 16, 17.

- - - - making several partial and particular dispositions relating to several parts of testator's estate, may be carried into effect by distinct instruments, for they make but one devise, 17.

These instruments must be declared upon particularly, 18.

- - - - making several dispositions of different interests in one and the same estate, may be effected by different instruments, 18, 19.

- - - - after it is made, may be modified and qualified by a subsequent devise, and a legacy take effect out of both, 19—22.

- - - - may be made to take effect with reference to another instrument, 22, 23. 48—52.

- - - - executed according to the statute of frauds, referring to another instrument, that instrument is considered as part thereof, 48—52.

- - - - under statutes Hen. VIII. must be entirely in writing, 25.

What construed writing within these statutes, *ibid.*

- - - - by a letter, expressing a man's intent as to the disposition of his property, sufficient, 25.

- - - - if in writing, good, though not written by devisor, 26.

Further observations on the construction of the word "writing," 26, 27, 28.

- - - - must have been completely put in writing during the life of the devisor, 28, 29.

That is as to each distinct devise, 29.

- - - - under these statutes, might be good in part and bad in part, 30.

- - - - - - - - need not have been signed, 30.

- - - - - - - - good, though the testator's name was not on the face of the instrument, 30, 31.

- - - - by any scrap of writing, though neither sealed, signed, or written by the testator, held good under these statutes, 31, 32.

Mischief

I N D E X.

Mischiefs that followed this construction, 32, 33.
Vide COPYHOLDS.

DEVISE, not good as such, cannot take effect as an appointment under a trust, 57.

- - - - to an university, &c. not executed according to the statute of frauds, cannot take effect as an appointment, 58.

Vide ESTATE, ESTATE EQUITABLE, DISSEISIN, DISQUALIFICATIONS to devise, THINGS devisable.

- - - - may be in fee simple absolute, 237.

- - - - - conditional, if the subject be not within the statute *de donis*, 237.

- - - - - of a determinable fee, 238.

- - - - - of a fee tail, ibid.

- - - - may not be of a fee to take place after a fee-simple, 238, 239, 240.

Contra, after a fee tail since the statute *de donis*, 240.

- - - - may be of an estate for life, 240, 241.

- - - - may be of an estate in remainder, ibid.

But doubts were formerly entertained as to disposing of a remainder in a thing created *de novo*, but now it is settled that a remainder may be limited in a thing created *de novo*, 241, 242.

Words proper to create a remainder, &c. 242, 243.

- - - - may be of a term *de novo*, 243.

Vide TERM *de novo*.

- - - - may be either absolute or conditional, 245, 246.

Vide INSANITY, FRAUDS, stat. of, CONDITION.

- - - - may be either of veited or contingent interests or estates, 248, 249.

Vide ESTATES veited, CONTINGENT Estates.

- - - - of an use, good at common law, 271.

- - - - of land, lodges both the land and the use thereof in the devisee, 271.

Contra, if another use expressed, 271, 272.

- - - - of an use, executed by the statute 27 Hen. VIII. of uses, 272.

Observations in answer to objections stated to the above proposition, in a late publication, 272—282.

- - - - of an authority good, 289.

- - - - of an authority to sell lands is within the statute of devises, 292.

- - - - that executors shall sell lands is a naked authority, 292.

- - - - of lands to executors to be distributed is a naked authority, 302.

Distinction between a devise that executors shall sell his land, and of lands to be sold by his executors, 302.

Observations in answer to some objections to the above distinction offered in a late publication, 302—310.

Vide POWERS.

- - - - to the nearest of blood of the children of A. who take thereby, 355.

Vide DEVISEE.

- - - - may fail of effect from various circumstances, some of which appear on the face of the instrument, and some of which exist *de hors* the instrument, 409, 410.

DEVISE

I N D E X.

DEVISE, may fail, by uncertainty or repugnancy on the face of the will, 411, 412.

Of the different kinds of uncertainty or repugnancy, 412—416.

- - - if the thing devised clearly described, will not fail for error in words of demonstration, 416.

- - - may be void for repugnancy; as if it contain proviso~~s~~ repugnant to what has been before directed, 417.

Vide **UNCERTAINTY**.

- - - - because the devisor's intent therein is not agreeable to the rules of law, 426.

- - - - the devisor's instructions not followed, 426, 427.

Exception, if that which pursues the devisor's instructions can be separated from that which is against them, 427.

- - - - it does no more than what the law would effect without it, 427—443.

As a devise by tenant in tail, to the heirs in tail of the same tail, 428, 429.

Distinction in this respect where the devisor has a remainder only of an estate, and where a reversion, 429.

Ground of this rule, 430.

Devising a reversion, *qua* a remainder, is not such an alteration of the estate as takes it out of this rule, 430, 431.

- - - of estate for life to the heir at law, void, for the fee-simple descending drowns the estate for life, 431—433.

- - - of an estate to the heir at law, charged with money to be paid, will not take it out of the above rule, 433—435.

Though to take by the devise is most beneficial for the heir, 435—439.

Alteration as to the time of heir's taking will not interfere with this principle.

Contra, if there be an alteration of the limitation of the estate, 439—442.

- - - to daughters, alters the descent, and consequently operates to give them an estate by purchase, 439.

- - - of Borough English lands to sons, alters the descent, and they take by purchase by the devise, 440.

So of gavelkind lands, 440.

Though the devise in the above cases had been to the sons or daughters as tenants in common, 440—442.

- - - may be void as to part, as doing only that which the law would have effected without the devise, and good for the residue, 442.

- - - may fail of effect, by reason of waiver by the devisee, 442—443.

Waiver may be either express or implied.

Whenever a person, having a claim on the devisor's estate, independant of him, and also a claim thereupon under his will, which claims are repugnant, pursues the former, the latter is thereby waived, 443—450.

Whether the benefit given by the will be immediate or consequential, 450—453.

Though

I N D E X.

Though the thing given by the will consist of personal property, 454.

Exception, if the devisee claim as a creditor under a devise for payment of debts, 454—458.

- - - if the will, whereby the property which the devisor is not entitled to dispose of is given, be not duly executed, 458—460.

Contra, if there be an express clause requiring the devisee to abide by the will, 460—463.

Exception, if the estate given be in lieu of a particular thing, 463, 464.

This rule, as to a presumed waiver of a devise, from the circumstance of the testator's doing an act inconsistent therewith, extends not to cases where he takes upon himself to dispose of lands that are not his, and in which he has no interest, 465.

DEVISE not construed to embrace property which is not the testator's, where he has other property to answer the description in the devise, 465, 466.

And in order to put a devisee to the alternative of waiving his interest under the will, or abandoning a property in which he has an interest, it must be shewn that his taking both will defeat the general intent of testator, 466—470.

- - - may fail of effect, by the devisor's performing it in his lifetime, 470, 471.

- - - - - as falling within the purview of the statute 3 and 4 W. and M. c. 14. against fraudulent devises to cheat creditors, 471—475.

Exception, where there is a limitation or appointment in the devise for payment of debts, 475, 476.

Vide PAROL DECLARATIONS.

- - - or codicil subsequent (the dispositions in which are different from a former one) made under a false impression, works only a contingent presumptive revocation, 546.

Contra, where the testator gives a reason for his subsequent devise, which is false, 547.

So if the testator rest his disposition upon a *fact* he assumes in his own knowledge, without reference to the reality of that fact, whether it come out in the event according to his conception or not, 548.

- - - revoked by a man's marriage, and having issue, 553, 556.

But marriage, &c. being only a presumptive revocation, it may be rebutted by circumstances, 556, 557.

Or by any kind of evidence, parol or written, 557—561.

Quære, whether marriage, &c. be a revocation of a devise, not disposing of all the testator's estate, 560—563.

- - - not revoked by a woman's marrying, but suspended, 563, 564.

- - - not revoked by an alteration in the personal capacity of the devisor; as his becoming *non compos* after making the will, or the like, 564, 565.

- - - revoked by an alienation and taking back of the fee in the land, &c. devised, 567.

Or making a feoffment thereof to the devisor's own use, 568.

Or

I N D E X.

Or to other uses, with remainder to his own right heirs, which is the old reversion, 568, 569.

And the law is the same, though the conveyance made be by lease and release, or bargain and sale, 568.

So of a recovery to the old uses, 570—572.

And the same rule applies to equitable estates, 572—573.

Whether positive or resulting, 573—576.

DEVISE where the thing lies in grant, revoked by a subsequent grant, if the fee therein affected thereby, 576—579.

Although these conveyances be made, done, or suffered for a particular purpose, 579, 580.

Even though the conveyance or assurance be necessary to give effect to the devise made previous, 580, 581.

And so declared to be by the devisor, 582.

Or done or suffered through mistake, 582, 583.

Or it be the very act which the testator intends to be done, and directs in his will, 583.

- - - of a lease for lives, will be revoked by a surrender and renewal made subsequent, 583—586.

- - - - for years renewable on fines, expressly devising thereof, will be revoked by surrender and renewal made subsequent, 586, 587.

Although the lease be described in terms applicable to the land and not to the interest therein, 587—589.

Vide **LEASE**.

- - - by parol, was a revocation of a will at common law, 607.

- - - to the poor of the parish, though void itself, revoked a former

'devise, 609.

- - - to a Papist, had the same effect, *ibid.*

Vide **GRANT**.

- - - not revoked by a stranger's cancelling or tearing it, 612.

- - - may be good as to part, although other parts obliterated by the testator subsequent to its execution, 643—646.

Vide **JURISDICTION OF COURTS**.

- - best proof of it is its production, 702.

Exemplified under the great seal, not evidence to a jury in ejectment.

Vide **PROBATE, ATTESTATION**.

- - how to be proved in Chancery, 714.

Vide **EQUITY, Court of**.

DEVISEES got possession of land devised by a writ of *ex gratia querela*, 4.

- - - had seisin given by the bailiff, *ibid.*

Or might enter *ibid.*

- - - must prove the testator to have been of sound and disposing mind, 70.

- - - might formerly have been bodies politic or corporate, but such bodies cannot now take by devise, 314.

May be natural persons or civil persons, 315.

Vide **COVERTURE, ALIEN, PAPIST, BASTARD**.

- - - may be persons in *esse* or not in *esse*, 315.

- - - - persons certain or uncertain, 319, 320.

DEVISEE

I N D E X.

DEVISEE may be a person not in *esse*, 320.

Distinction formerly between a devise to a person not in *esse* in *presenti*, or in remainder, 320—330.

Ground of the above distinction, 330, 331.

The distinction clearly does not now exist where there is any circumstance to evince the intention of a future gift, 332—336.

- - - - may be civil persons in *esse* or not in *esse*, 336.

- - - - in *esse* as executors, *ibid.*

But parishioners, *qua* such, cannot be devisees, *ibid.*

- - - - not in *esse*, as executors of executors, 337.

- - - - must be ascertained by nomination or description, 337.

By nomination, *ibid.*

By description, *ibid.*

- - - - ascertained by description, the description may be made good by reputation, 338.

Vide **BASTARD**.

- - - - described as "a wife" may take, though she be not so, if she be reputed as such, 340.

- - - - may be constituted by equivocal names, as *puer*, &c. 340.

- - - - well described as son of such a one, 340.

- - - - - as first son *not heir at law*, 340—342.

- - - - - as *proximo consanguinitatis* of the devisor, 342—343.

An elder daughter may take as a special heir described, 343, 344.

- - - - may be constituted by description of child or children, 344.

- - - - may be described *generally* or *specially*, 345.

Instances of the first kind, 345—365.

Vide **STOCK**, **NEXT OF KIN**, **POSTERITY**, **RELATION**, **HEIR**, **NEXT OF THE NAME**.

- - - - described as "heir" may not take by purchase as such, where his ancestor takes an estate for life by the same devise, 355—358.

Exceptions to this rule. Vide **HEIR**, **ISSUE**.

Observations on the different import of the words "Heir" and "Issue," 360—365.

- - - - may be described specially, 365.

Vide **HEIR male now living**.

- - - - may be described as second son, and the description shall be construed literally, 366.

- - - - may be described by reference to customary heir, 366, 367, 374, 401.

- - - - must answer strictly the description given by the testator, 367.

Vide **HEIR**.

- - - - constituted heir by appellation, how it operates, 395—398.

- - - - constituted by the name of heir of all the devisor's lands, shall take a fee therein, 398.

Contra, if by the name of executor or executrix, *ibid.*

Although the devisor have no land that the devisee can take as executor or executrix, *ibid.*

- - - - called heir by mistake in a will, shall nevertheless take as such, 400, 401.

I N D E X.

DEVISEE constituted by description, if made out with sufficient certainty to identify the person, shall take notwithstanding trifling omissions or misprisions, 403—407.

Contra, if the description be false and not merely imperfect, for then the devise will be void, 407, 408.

Vide **UNCERTAINTY**.

- - - shall elect, if devise be of one of the testator's manors, 425.

DEVISOR may be "all persons" who may convey, not disqualified at common law, or by the statutes of wills, 139.

All persons includes civil as well as natural persons, *ibid.*

- - - cannot be a person dead in law, *ibid.*

- - - - a body politic aggregate in its politic capacity, 139.

- - - - a sole corporation, who may not dispose of the lands, &c. of their corporation, *ibid.*

Vide **DISQUALIFICATIONS to devise**.

DETINUE lies against the Prerogative Court if they refuse to deliver a will of land, 723.

DISQUALIFICATIONS to devise, whence they arise, 139, 140.

- - - - - relate either to the person or estate of the devisor, 139, 140.

- - - - - personal. Vide **INFANCY, INSANITY, NONSANE MEMORY, COVERTURE, RESTRAINT, DURESS or MENACE OF IMPRISONMENT**.

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- - - - - is not applicable to a wife, 350—352.

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- - - - - of a former will made by a latter, is ambulatory till the testator's death, the revoked instrument being set up again by destroying the revoking instrument, 549—551.

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- - - - - by acts *in pais*, may be by a total alteration in the circumstances of the devisor, or by an actual or intended alteration in the estate of the devisor, 554.

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- - - - - &c. depending upon the intention to revoke, proof may be received that the devisor had no such intent. 607—609.

- - - - - &c. will be effected; although the alteration does not actually take place by reason of the incapacity of the person in whose favour it is made to benefit thereby, 609, 610.

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This clause extends to money charged on lands, 630.
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- - - why required rather than sealing, 61.
- - - sufficient, if devisor's name at the introductory part of a will, 62.
- - - and sealing said to be analogous, 63, cont. 67.

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- - - - - construed not to extend to contingent interests, 34.
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- - - - - 25 G. II. c. 6. . . 122. 129. 133, 134.
- - - - - 43 Eliz. c. 4. . . 58. 314.
- - - - - 11 and 12 Will. III. cap. . . 318.
- - - - - 18 Geo. III. c. 60. . . . ibid.
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- - - - - on paper in which a will wrapped up sufficient, ibid.
- - - - - must be in the *presence* of the testator, that is within his *view*, ibid.

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